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**TRADE LIBERALISATION AND ILO LABOUR  
STANDARDS:  
SOME FUTURE DIRECTIONS**

**James Heenan**

**Thesis submitted for the degree of Master of Comparative  
and International Law  
European University Institute**

**Florence  
October  
1999**

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## I. INTRODUCTION

*And of course the arena where we're "supposed" to discuss these issues is always something toothless like the International Labor Organization. Pigs will fly before you hear about an anti-worker US labor law being threatened by the ILO.*

- *United Students Against Sweatshops, 22 August 1999*

International labour rights are enjoying a renaissance. The issue of the conditions under which people work across the world is again moving towards the centre of the political stage, not only in individual countries such as the United States and the members of the European Union, but also in the multilateral fora. After the demise (albeit perhaps temporary) of the social clause debate in the GATT in the early 1990s, the past two years have seen a significant increase not only in international labour rights advocacy, but also in the visibility of that activity and the breadth of participation in the debate. When the World Trade Organisation (WTO) attempted to exclude a labour conditions link to international trade sanctions in 1996,<sup>1</sup> consternation or jubilation was felt in international organisations and trade and labour ministries around the world, but the uninvolved layperson knew little about the outcome and perhaps less about the issues involved. By 1998 however, the issues of trade and labour rights were to be dealt with not by diplomats inside international organisations, but by activists outside on the street, some being less violent (the Global March Against Child Labour outside the headquarters of the International Labour Organization in Geneva of June 1998) than others (the WTO protest of September 1998). These types of developments have, with the help of the media, brought the issues clearly into the mainstream public arena.

Far from waning, the international labour rights trend looks like continuing well into the millennium year. In the United States, the student anti-sweatshop campaign<sup>2</sup> is now the largest campus-based movement in that country since the Vietnam War protests,<sup>3</sup> with its

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<sup>1</sup> World Trade Organization (WTO) Singapore Ministerial Declaration, WT/MIN(96)/DEC/W.

<sup>2</sup> United Students Against Sweatshops :<http://home.sprintmail.com/~jeffnkari/USAS/>.

<sup>3</sup> 'Activism surges at campuses nationwide, and labor is at issue', *New York Times*, 29 March 1999.



leaders enjoying media profiles and the attention of senior Democrat politicians.<sup>4</sup> At the same time we see the advent of a plethora of private initiatives in developed countries aimed guaranteeing certain levels of working conditions for producers of goods manufactured in the developing world. These initiatives largely derive from the new-found power of the consumer, power which has been used to boycott some of the largest multinational corporation in the world. From formal quasi-governmental initiatives such as the Fair Labour Association in the United States,<sup>5</sup> to the many hundreds of corporate codes of conduct and social labelling schemes, the promotion of labour rights (or in many corporate instances, the interest in being seen to be promoting labour rights) appears to be growing both in the public and private spheres. The centrality of the issue to the contemporary international debate will likely be underlined in the lead up to and during the Third WTO Ministerial Conference opening in Seattle on 30 November.<sup>6</sup>

The central issue in this movement (if it can be termed as such) concerns the way in which acceptable conditions of work can be guaranteed to workers all over the world.

This not insignificant goal has preoccupied individuals and organisations for at least the last 100 years, not the least of which has been the International Labour Organization (ILO) which is the largest and most truly global source of international labour regulation. This latest surge in labour rights activism, however, does not look to rely on the ILO's system of labour standards and their supervisory mechanisms. More distressing for the ILO is the fact that the students, the labour-activists, the multinationals, the (largely liberal-Western) governments and other actors rarely even mention the existence of the ILO's sophisticated and long-standing system. Although relatively successful in the past, the ILO system is seen by many as being ineffective in an era of liberalised trade and globalised labour markets. The actors are looking for new tools to gain and maintain

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<sup>4</sup> Student leaders were invited to brief the senior policy advisor to Democrat House Minority Leader Richard Gephardt on 19 July 1999.

<sup>5</sup> See <http://www.dol.gov/dol/esa/public/nosweat/partnership/aip.htm>.

<sup>6</sup> Building on the Global Day of Protest Against the WTO on 15 September 1999, trade ministers meeting in Seattle will compete with rallies such as the International Forum On Globalization Teach-In on the World Trade Organization, the People's Assembly/March-Rally Against WTO/Globalization, and the AFL-CIO Rally and March at the WTO. See



labour rights, and international labour standards in the ILO mould are seen as unresponsive and outdated.

Regarded from any point of view, these developments squarely challenge the ILO and its system of labour standards. In responding, it is submitted that the Organisation has two broad options: to either revise its labour standards system so as to make it more responsive to the changed global context, or to move beyond standards as a means of regulating labour rights across the globe. Revision of the labour standards system has long been on the ILO agenda. Relatively minor aspects of the system have been revised over its seventy year history, though the basic structures, scope and conception have remained unchanged. Moving beyond standards has been a step that the ILO has, until recently, not been prepared to take for fear of weakening the labour standards system and ultimately the ILO itself. As the core activity of the Organization, and the oldest and largest consensus based system of international regulation in the world, a move away from the core ideal of standards could only be contemplated if the maintenance of the standards system was itself undermining the feasibility of the Organization. For many, this point has been reached.

Whether or not this is true, two new methods of regulating labour rights at the international level have arisen as options to the ILO's system of international labour standards. The first of these options (the ILO Declaration on Fundamental Principles and Rights Work of June 1998) came from within the Organisation while the other (private sector initiatives, of which corporate codes of conduct and social labelling are the most important) originated outside of the ILO . This thesis proposes to look critically at each of these methods as alternatives to the international labour standards system, exploring the effectiveness and limitations of each and suggesting what their adoption by the ILO might mean for the future the of the Organization's system of labour standards.



## II. A BRIEF OVERVIEW OF THE ILO'S SYSTEM OF INTERNATIONAL LABOUR STANDARDS AND IMPACT OF GLOBAL TRADE LIBERALISATION ON THAT SYSTEM

Much has been written on the ILO's standard setting activities.<sup>7</sup> The purpose of this

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<sup>7</sup> A selection would include: J-M. Bonvin, *L'Organisation internationale du travail: Etude sur une agence productrice de normes* (Paris: Presses Universitaires de France, 1998); Alcock, A. *History of the International Labour Organisation* (London: Macmillan, 1971); Galenson (above); Ghebali, V.Y. 'Vers la reforme de l'Organisation internationale du Travail', 30 *Ann. Francais de Droit Int'l* pp. 649-671 (1984); Ghebali, V.Y. *The International Labour Organisation : A Case Study on the Evolution of UN Specialised Agencies* (Dordrecht: Martinus Nijhoff, 1989); Gould, W.B. 'The rights of wage earners : Of human rights and international labor standards', 3 *Indus. Rel. L. J.* pp. 489-516 (1979); Gross Espiell, H. *La Organizacion Internacional del Trabajo y los Derechos Humanos en America Latina* (Buenos Aires : EUDEBA, 1986); Jenks, C.W. *Social Justice in The Law of Nations: The ILO Impact After Fifty Years* (London: OUP, 1970); Johnston, G.A. *The International Labour Organisation. Its Work for Social and Economic Progress* (London: Europa Publications, 1970); Joyce, J. *World Labour Rights and their Protection* (London: Croom Helm, 1980); Landy, E.A. 'The Influence of International Labour Standards. Possibilities and Performance', 101 *International Labour Review* pp. 555-604 (1970); Landy, E.A. *The Effectiveness of International Supervision: Three Decades of ILO experience* (NY: Oceana Publications, 1966); Leary, V. *International Labour Conventions and National Law* (The Hague: Martinus Nijhoff, 1981); Poulantzas, N.M. 'International Protection of Human Implementation Procedures Within the Framework of the International Labour Organisation', 25 *Revue hellenique de droit International*, pp. 110-141 (1972); Pouyat, A.J. 'The ILO's freedom of association standards and machinery : a summing up', 121 *International Labour Review*, pp. 287-302 (1982); Rood, M.G. 'ILO en Mensenrechten', 12 *Nederlands Juristen Comite voor de Mensenrechten-Bull.* pp. 429-436 (1987); Samson, K.T. 'The Changing Pattern of ILO Supervision', 118 *International Labour Review*, pp. 569-87 (1979); Samson, K.T. 'International Labour Organisation and Human Rights in 1970', 5 *Revue des droits de l'homme*, pp. 103-117 (1971); Servais, J.M. 'Flexibility and rigidity in international labour standards', 125 *International Labour Review*, pp. 193-209 (1986); Valticos, N. *Le droit international du travail* (Paris: Dalloz, 1980); Valticos, N. 'Fifty Years of Standard-Setting Activities by the International Labour Organisation', 100 *International Labour Review* pp. 201-37 (1969); Valticos, N. 'The Future Prospects for International Labour Standards', 118 *International Labour Review*. pp. 679-97 (1979); Valticos, N. 'International Labour Organisation: its contribution to the rule of law and the international protection of human rights', 9 *Int'l Commission of Jurists Review*, pp. 3-34 (1968); Valticos, N. 'Les Normes de l'organisation internationale du travail en matiere de protection des droits de l'homme', 4 *Revue des droits de l'homme* pp. 691-771 (1971); Valticos, N. 'The Role of the ILO: Future Perspectives', in *Human Rights : Thirty Years After the Universal Declaration* (ed. B. Ramcharan) (The Hague: Martinus Nijhoff, 1979); Wolf, F. 'ILO Experience in the Implementation of Human Rights', 10 *Journal of International Law and Economics*. pp. 599-625 (1975); Wolf, F. 'Human Rights and the International Labour Organization', in *Human Rights in International Law: Legal and Policy Issues* pp. 273-305 (ed. T. Meron) (Oxford: Clarendon Press, 1984); Zenger, A. 'Les Droits de l'Homme et le Controle de leur Application au Sein de





overview is not to retrace that ground but to merely flag some features of the system that will allow us firstly to sketch a similarly brief outline of the challenges to the ILO standards system posed by trade liberalisation, and secondly to undertake a more informed discussion of options open to the Organisation in responding to these challenges.

Since its founding in 1919, the construction and maintenance of an 'international labour code'<sup>8</sup> has been central to the mission of the ILO,<sup>9</sup> and is still seen as the principal way in which the ILO fulfils its mandate and pursues the principles laid down in its Constitution.<sup>10</sup> Although other sources of regulation of labour conditions at the international level has appeared in the meantime,<sup>11</sup> none can compare to the ILO's system of 182 conventions and 190 recommendations for breadth of subject and coverage.<sup>12</sup> More significantly, the ILO's system was until recently, generally held up by many commentators as an example of a successful exercise in international regulation,<sup>13</sup> which has been manifested in various ways. Perhaps primarily, the system survived intact not

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*L'Organisation Internationale du Travail*, in *Volkerrecht im Dienste des Menschen. Festschrift für Hans Haug* pp. 401-416 (Berne, 1986).

<sup>8</sup> The term originated within the ILO: W. Jenks 'The *Corpus Juris* of Social Justice', in *Law, Freedom and Welfare* (London, 1963), quoted in N. Valticos and G. von Potobsky, *International Labour Law* (Deventer: Kluwer, 1995), p. 57.

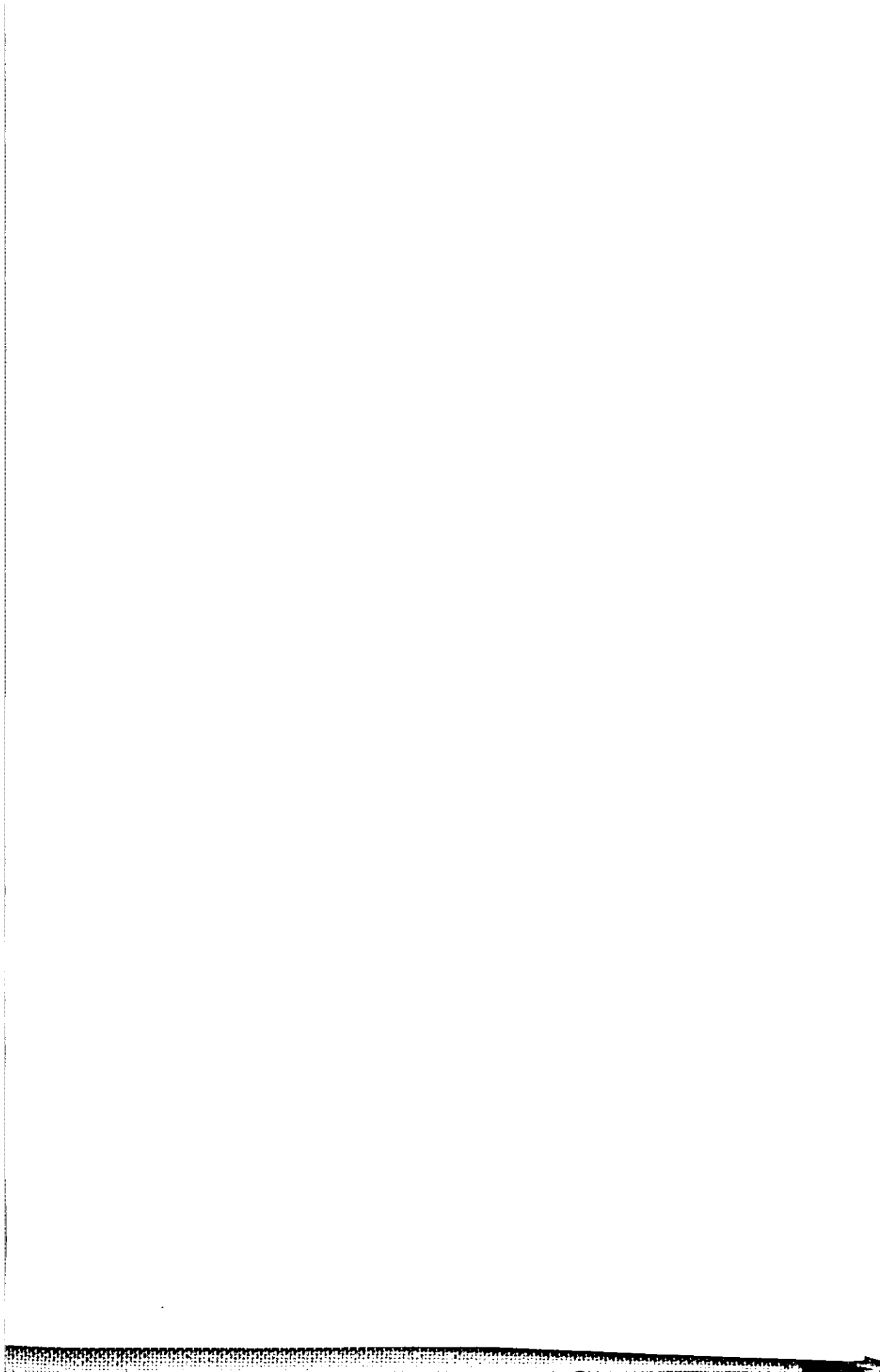
<sup>9</sup> H. Bartolomei, G. von Potobsky and L. Sweptson, *The International Labour Organization: The international standards system and basic human rights* (Boulder, CO: Westview, 1996), p. 19; W. Galenson, *The International Labour Organization: an American view* (Madison: Wisconsin, 1981), p. 15.

<sup>10</sup> See the Preamble to the ILO Constitution and Article 3 of the Declaration of Philadelphia.

<sup>11</sup> Such as those of the Council of Europe and the European Communities.

<sup>12</sup> ILO membership currently stands at 174 states. This compares with 191 for the World Health Organisation, 186 for UNESCO, 185 for United Nations and 181 for the World Bank (IBRD only).

<sup>13</sup> See: Leary, *International Labour Conventions and National Law*, p. 17; Bonvin, *L'Organisation internationale du travail*; Leary, 'Lessons from the Experience of the International Labour Organisation' in *The United Nations and Human Rights: a Critical Appraisal* (ed. P. Alston) (Oxford: Clarendon Press, 1992), p. 580 at 588-95; Galenson, p. 250; C. Murphy, *International Organisation and Industrial Change: Global Governance Since 1850*, (Cambridge: Polity Press, 1994) p. 199; Bartolomei, von Potobsky & Sweptson, p. 21; Landy, *The Effectiveness of International Supervision*, p. 198-201; M. Rood, 'Internationalization: a New Incentive' in *Labour Law at the Crossroads: Changing Employment Relationships* (eds. J. Bellace and M. Rood) (London: Kluwer, 1997), p. 153.



only the demise of the League of Nations, but also the destruction of the Second World War and the ideological confrontation of the Cold War. Over that 80 years the number of conventions adopted by the Organisation's legislative body, the International Labour Conference (ILC), has risen unrelentingly while the basic structure and conception of the standard setting process has remained unchanged. That this is not a hollow statistic of success is shown by the corresponding rise in ratifications of ILO conventions adopted by the ILC that occurred until the last two decades. The effect of these ratifications on the actual situation of workers in ratifying states is at times difficult to gauge, but a body of literature attests to real, if incremental, suffusion of convention norms through domestic labour laws.<sup>14</sup> Much of this success rested on the nature and functioning in practice of the ILO systems supervisory mechanisms, which were seen to have achieved the fine balance between robust supervision and an accommodation of national and cultural sensitivities. An indicator of this success is the fact that many of the features of the ILO system have been adopted by other UN bodies.<sup>15</sup>

Let us briefly outline the features of the ILO international labour standards system that are said to have contributed to this success. First, normative activity is conducted almost exclusively through the adoption of conventions and recommendations.<sup>16</sup> As such, standards are arrived at through a process which is consensual and highly consultative.<sup>17</sup> The key to the consensus is tripartism; the hallowed ILO principle by which all legislative

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<sup>14</sup> Bartolomei, von Potobsky and Sweptson, 127-257; Valticos and von Potobsky, 91-271; Leary, *International Labour Conventions and National Law*; R. Ben-Israel, *International Labour Standards: the Case of Freedom to Strike* (Deventer: Kluwer, 1988).

<sup>15</sup> Leary, 'Lessons from the Experience of the International Labour Organisation', p. 618.

<sup>16</sup> To a much lesser extent through the decisions of supervisory bodies, resolutions of executive bodies, and guidelines on health and safety: see Bartolomei, von Potobsky and Sweptson, p. 13;

<sup>17</sup> The subject of a possible convention is usually proposed by the Governing Body of the ILO based on a survey of existing standards. The proposal will then often go to a preliminary technical conference before being placed on the agenda of the Conference, which will discuss the draft convention over two sessions (i.e. over two years). The Conference has before it four reports: a report of the Office, a summary of the replies of member states (including input of employer and employee representatives) to the Office report, the report of a conference committee set up to examine the proposal and a further summary of the replies of member states to a draft text. The conference committee then drafts the final text and a drafting committee makes a final check before the instrument is proposed for adoption. This procedure can be abridged in cases of 'special urgency' (Article 34(7) ILC Standing Orders).



and executive work of the organisation is subject to input by not only governments but also worker and employer groups. This feature, which is not shared by any other international body, not only gives the Organisation a broader clientele, but also allows it to establish direct links with domestic actors, links which are important in the drafting and supervision of labour standards.<sup>18</sup> Tripartism thus lends ILO conventions a level of authority that instruments negotiated solely by states lack:

Standards are the result of comparative work of a utilitarian nature, with an ethical content of social development to be attained through international tripartite debate. They should be seen as the result of an international tripartite exchange of experience intended to guide the evolution and transformation of social institutions. Here lies their value and permanent usefulness.<sup>19</sup>

Consensus, even if it were only among states, gives conventions stature. No member is obliged to ratify an ILO convention, hence when it does so, much is made of it 'freely undertaken obligations'. The system, of course, pressures states towards ratification in other ways, for example by placing an obligation on member states to *submit* conventions to national legislators for ratification (even if they are ultimately rejected) and by requiring non-ratifying states to, in some circumstances, report on why they feel they cannot ratify a given convention.<sup>20</sup>

Success is also borne of the precision with which standards are set. Obligations can be clearly defined, recognised and, with some notable exceptions, supervised.<sup>21</sup> Standards must also comply with a principle of universality which ordains that their application is unchanging across all member states. The inherent rigidities of this approach are mitigated by the insertion into standards of a range of mechanisms that provide some

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<sup>18</sup> Galenson, p. 11.

<sup>19</sup> Valticos and von Potobsky, p. 30. Leary is of the view that tripartism also helps to depoliticise the Organisation (Leary *International Labour Conventions and National Law*, p. 152), though it is difficult to accept this when one considers the plethora of new interests and agendas that accompany both the workers and employers groups.

<sup>20</sup> Article 19(5) of the ILO Constitution.

<sup>21</sup> Promotional conventions which oblige a member state to move towards certain goals have always caused problems in this respect. An example is ILO Convention 122 on employment policy, which will be discussed later.



flexibility.<sup>22</sup> Finally, the creation of ILO standards benefits from the input of a highly trained technical staff in the Organisation's secretariat, the International Labour Office (the Office). Conforming to certain functionalist imperatives,<sup>23</sup> the Organisation is serviced by a large and powerful secretariat of technical specialists designed to provide the balance against the 'political' tripartite bodies necessary for progress.<sup>24</sup>

The standards' supervisory mechanisms have also been lauded. While the fact they provide for regular reviews of compliance is more commonplace in other parts of the UN system today, during much of the ILO's history this approach was singular. That is still the case in respect of the ILO system's provision of 'constitutional procedures of representation and complaint',<sup>25</sup> procedure that are not so well established outside the ILO.<sup>26</sup> Supervisory mechanisms include both technical and political stages, the former being exemplified by the review of the Committee of Experts and the latter by the discussion of the Committee of Experts' report in both the tripartite Governing Body and the Conference.<sup>27</sup> This dichotomy is strengthened by a history of a high level of independence on the part of the Committee of Experts, when compared to other

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<sup>22</sup> Hence some conventions allow members to ratify only certain parts of the convention, with a view to full ratification at some future date when local conditions have developed. Others allow members to specify the level of the standard they are willing to apply on ratification (as long as it is above the minimum laid down in the convention). Other means of dealing with the rigidity in universal standards include: giving members freedom to set the scope of a convention (for example, to whom or in which region it will apply); the use of general language in imposing obligations (for example 'adequate', 'sufficient'); and the use of *temporary* exemptions based on under-development of the member state. In addition, there has been a slight trend away from the setting of substantive standards to the adoption of so-called 'promotional conventions'. These conventions do not set concrete standards to be achieved, but rather call for a general policy to be established. Examples are Convention 122 on employment policy, and the group of conventions relating to social security.

<sup>23</sup> The landmark work by Ernst Haas, *Beyond the nation-state: functionalism and international organization* (Stanford: Stanford U. P., 1964), chooses the ILO as an example of a functionalist international organisation.

<sup>24</sup> See Leary, 'Lessons from the Experience of the International Labour Organisation', p. 614.

<sup>25</sup> Wilfred Jenks cited in Bartolomei, von Potobsky & Swepston, p. 23.

<sup>26</sup> It has been suggested that because the ILO conventions before World War Two were technical in nature, the supervisory mechanisms were allowed to become entrenched before the adoption of more controversial human rights conventions after the war. Leary, 'Lessons from the Experience of the International Labour Organisation', p. 619.

<sup>27</sup> E. Landy, *The Effectiveness of International Supervision*, p. 200.

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'independent bodies' in the UN system.

These features and the success they are said to have brought, made the ILO justifiably proud of its standards system, a pride that may have peaked in 1969 when the Organisation won the Nobel Peace Prize. The last three decades, however, have seen a gradual decline praise for the ILO standards system. The system has been increasingly pressured by changing circumstances in the world of work. The systems strength of immutability quickly became a weakness, as work and employment had changed greatly from that of the 1930s when the system was consolidated. High structural unemployment, stagflation, multinational corporations and a huge increase in post-colonial independent states formed new features on the landscape that the system struggled to negotiate. Matters were not helped by an inaction on the part of the ILO, born of self-satisfaction that its system was a model for all others.

By the 1980s, a weakened system was faced with the advent of global trade liberalisation. The exponential rise in foreign direct investment and capital flows generally, the dismantling of trade barriers, the large advance in communications and transport technology in a short period and the accompanying trend towards non-interventionist governance policies gradually robbed the ILO system of its strengths. The power of workers organisations have shrunk such that post-millennial unionisation rates are expected to drop to ten per cent of the workforce. The domestic public sector on which standards relied for their implementation likewise contracted. Governments themselves have become increasingly unable to control labour policy, as job-creating capital is now 'foot loose' and will relocate production to a low cost competitor with any hint that labour costs will rise. The (largely developing) countries who make up these low cost competitors are increasingly indisposed to ratifying ILO conventions, whose 'inflexible' provisions they see as threatening their competitive advantage. In social rights areas where the ILO conventions incrementally built up worker benefit in correspondence with the construction of the post-war welfare state, member states were discovering that they could no longer afford to comply with ILO conventions on social security and

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pension benefits. More generally, they felt they could no longer afford the realm of other technical ILO conventions which were seen to hamper their international competitiveness.

Whether trade liberalisation is responsible for a general lowering of labour standards is a matter of current debate.<sup>28</sup> One can find literature showing 'empirically' that trade liberalisation has or has not affected labour standards, as the case may.<sup>29</sup> Whatever the case may be, trade liberalisation clearly has, in theory, the potential to undermine labour standards, at least in the short term.<sup>30</sup> As outlined above trade liberalisation has also affected the means for regulation of labour issues through the setting of labour standards. The setting of labour standards at the national level has been attacked by the proponents of 'flexibility' in modes and conditions of work. It is argued that the lack of flexibility afforded by standards of national application prevents enterprises from adapting to the changes posed by the integrated world market. The alternative proposed is a regime whereby conditions of work are bargained after taking into account the geographic and

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<sup>28</sup> See, e.g., E. Lee, 'Globalisation and labour standards: a review of the issues', 136(2) *International Labour Review* (1997), 173; J. Williamson, 'Globalisation, Labour Markets and Policy Backlash in the Past', 12 *Journal of Economic Perspectives* (1998), 51; B. Langille, *Eight Ways to Think About Labour Standards and Globalization* (Geneva, 1997); S. Charnovitz 'Trade Employment and Labour Standards: the OECD Study and Recent Developments in the Trade and Labour Standards Debate', 11 *Temple International and Comparative Law Journal*, No. 1, 1997, 131; *Human Rights, Labour Rights and International Trade* (eds. L. Compa and S. Diamond) (Philadelphia: Penn, 1996); G. Teeple, *Globalization and the Decline of Social Reform* (Toronto: Garamond, 1995); W. Sengenberger and D. Campbell (eds) *International Labour Standards and Economic Interdependence* (Geneva: ILO, 1994).

<sup>29</sup> See, for example, K. Maskus, *Should Core Labour Standards be Imposed Through International Trade Policy*, World Bank Policy Research Working Paper No. 1817, (Washington: World Bank, 1997); M. Slaughter and P. Swagel *Does globalisation lower wages and export jobs?*, (Washington, 1997); OECD, *Employment and Labour Standards: A study of core worker rights and international trade*, (Paris: OECD, 1996) [hereafter 'OECD Report']; C. Murray, *International Organisation and Industrial Change* (Cambridge, Polity, 1994); ILO, *Studies on the social aspects of globalization - Republic of Korea and Chile* (Geneva: ILO, 1998); G. Atkinson, 'The Political Economy of Liberalization and Regulation: Trade Policy and the New Era', Vol. 32(2) (1998) *Journal of Economic Issues*, p. 419; M. Allais, 'The Liberalization of Trade and the European Community's Experience', Vol. 44 (1997) *Rivista internazionale di scienze economiche e commerciali*, p. 465.

<sup>30</sup> Much of the literature which finds trade liberalisation beneficial to labour standards relies on longer-term standard of living forecasts, assuming an eventual distribution of the wealth obtained from liberalised markets.



financial position of the enterprise, the economic climate and worker expectations. It is claimed that governments in fact have no choice but to accept this situation as capital and jobs will simply leave the jurisdiction. Whether this is in fact the case or not is unclear.<sup>31</sup> However, it is a model that is increasingly followed by many governments, and in some cases (such as that of New Zealand) to the extreme.<sup>32</sup> The result is a paring down of national labour codes to a small set of 'core' conditions. All other conditions of the employment relationship are either left entirely open to negotiation between employers and workers (often to the exclusion of collective representation) or are to be 'reasonable' in the circumstances.

These developments squarely challenge the ILO's system of international labour standards. The Organisation is currently under pressure to respond. It is argued that in the first instance the Organisation has two options: either reform the standards system to adapt it to the changed circumstances; or move beyond standards as a means of regulating conditions of work world-wide. The Organisation is currently being considering two proposals as to how it should proceed. The first, the ILO Declaration on Fundamental Principles and Rights at Work, is an initiative devised and created within the ILO. The other, corporate codes of conduct, has grown outside of the Organisation and is now forcing its way onto the ILO's agenda. This thesis proposes to look at each of these two proposals in turn considering: their effectiveness and limitations; and what their adoption might mean for the future of the ILO labour standards system.

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<sup>31</sup> See, e.g., M. Amiti, 'Trade Liberalisation and the Location of Manufacturing Firms', Vol. 21 (1998) *World Economy*, p. 953 at 961; and G. Atkinson, 'The Political Economy of Liberalization and Regulation: Trade Policy and the New Era', Vol. 32(2) (1998), *Journal of Economic Issues*, p. 419 at 425.

<sup>32</sup> See A. Honeybone, 'Introducing labour flexibility: The example of New Zealand', Vol. 136(4) *International labour review* (1997), p. 493.

[illegible]

1. 2. 3.

12. 4.

1. *Chlorophyll a* (Chl *a*)

[illegible]
$$\frac{\partial}{\partial t} \left( \frac{\partial \phi}{\partial t} \right) = \frac{\partial}{\partial t} \left( \frac{\partial \phi}{\partial t} \right)$$

1. *Chlorophyll a* (Chl *a*)

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Lichtenthaler and Whistler (1973). The total chlorophyll content was determined by the method of Arar and Cook (1980). The carotenoid content was determined by the method of Lichtenthaler and Whistler (1973).

1. *Chlorophyll a* (Chl *a*)

1. 2. 3.

100

1. *Chlorophyll a* and *Chlorophyll b* contents were determined by spectrophotometry using the method of Lichtenthal and Whaley (1987).

1. 2. 3. 4.

1. *Chlorophyll a* (Chl *a*)

Condition	Control (n=10)	MCI (n=10)	AD (n=10)
1	~95	~85	~75
2	~90	~80	~70
3	~85	~75	~65
4	~85	~75	~65

1993 (12)

Figure 1 consists of two line graphs, (a) and (b), plotting the rate of reaction against temperature in degrees Celsius.

Graph (a) shows a bell-shaped curve. The rate of reaction starts at 0 at 0°C, rises to a peak of 1.0 at 30°C, and then falls to 0 at 40°C. The y-axis is labeled 'Rate of reaction' and ranges from 0 to 1.0. The x-axis is labeled 'Temperature / °C' and ranges from 0 to 40.

Graph (b) shows an exponential increase in the rate of reaction with temperature. The rate starts at 0 at 0°C and increases steadily, reaching 1.0 at 40°C. The y-axis is labeled 'Rate of reaction' and ranges from 0 to 1.0. The x-axis is labeled 'Temperature / °C' and ranges from 0 to 40.

$$E_{\text{eff}} = \frac{E_0}{1 + \frac{1}{2} \frac{E_0}{E_{\text{eff}}}}$$

### III. THE DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK

#### 1. *The background to the Declaration*

The ILO Declaration on Fundamental Principles and Rights at Work ('the Declaration') forms the most far-reaching response of the ILO to the challenges of trade liberalisation outlined in the previous section. Seen from the approach of this thesis, it is the most important initiative in this area to have been generated from within the ILO, and as such forms the cornerstone of the proposed reforms of the Organisation that have been initiated by the new Director General.<sup>33</sup>

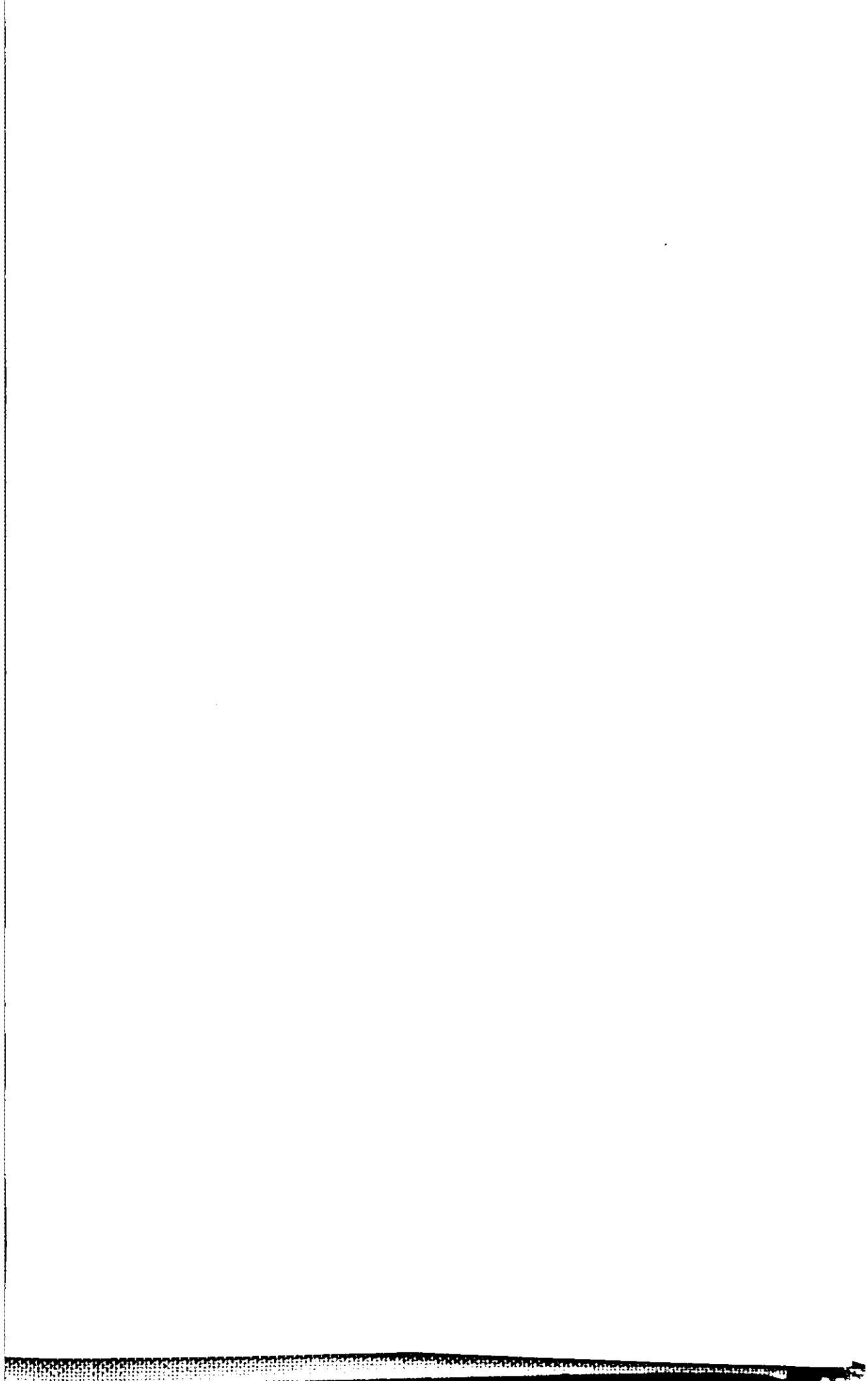
The origins of the Declaration lie in the general social clause debate. While proponents of the social clause directed their calls toward the WTO and other trade regime bodies, these organisations maintained that the issue of labour standards lay within the mandate of the ILO and could not be constitutionally dealt with in the trade sphere.<sup>34</sup> This position was supported by the Copenhagen Declaration on Social Development of 12 March 1995 which called on governments to respect worker rights through 'ratification and full implementation of ILO conventions', to use 'existing international labour standards to guide the formulation of national labour legislation and policies', and generally to promote 'the role of ILO, particularly as regards improving the level of employment and the quality of work'.<sup>35</sup>

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<sup>33</sup> From 39 major programmes, the ILO's work has been reorganised into four strategic objectives: Fundamental Principles and Rights at Work; Employment; Social Protection; and Social Dialogue: *Report of the Director-General: Decent Work* (Geneva: International Labour Office, 1999), p. 2 [hereafter, *Decent Work*]. Fundamental Principles and Rights at Work Employment is first mentioned and has been allocated 22% of the ILO budget for 2000-1 allocated to Strategic Objectives: GB.274/PFA/9/2. (*Programme and Budget Proposals for 2000-01*).

<sup>34</sup> World Trade Organisation, Ministerial Declaration, para. 4. WT/MIN(96)/DEC/W 13 December 1996.

<sup>35</sup> See Report of the World Summit for Social Development UN Doc. A/CONF.166/9 paras 54(c) (d) and (e) respectively.





It is surprising (or perhaps indicative of the way in which the ILO functions) that these unambiguous calls for ILO action together with pressure from the Organisation's own constituents (principally the workers and those member states pushing the social clause in other arena) did not produce a more timely and structured response from the Organisation.<sup>36</sup> The first step came in 1994 with the then Director General's report to the 1994 ILC entitled *Defending Values, promoting change. Social Justice in a global economy: An ILO Agenda*. In this Report the Director-General outlined some of the challenges of globalisation, reiterated the relevance of the ILO in the modern world and, importantly, called for a 'broader approach' to the Organization's standard-setting activities, which he called 'our original vocation and our strongest claim to fame'.<sup>37</sup> A feature of this broader approach was to be the promotion of 'fundamental rights' as a distinct goal of the ILO.<sup>38</sup> In keeping with ILO practice to date, coercion as a tool for promoting these rights was rejected in favour of persuasion.<sup>39</sup> Subsequently, the Governing Body set up a Working Party on the Social Dimensions of the Liberalisation of International Trade (WP/SDL) which was to co-ordinate these initiatives and develop others.<sup>40</sup>

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<sup>36</sup> A common response of the Office to such criticisms is that 'the Organisation can only move as fast as its member states allow'. That this formalistic response cannot be sustained in the real world of international organisations is clear not only from the experience of other organisations (take as examples the initiatives of the UNDP Administrator in the area of human rights beyond that formally sanctioned by the UNDP Executive Board and the Comprehensive Development Framework initiative of the current World Bank President (see <http://www.worldbank.org/cdf/>)), but also from the early history of the ILO itself. Originally conceived by its founding member states as essentially a research and statistical body, the ILO's sphere of activity was unilaterally widened by Albert Thomas, its first Director General, to include, for example, direct liaison with and even lobbying of governments, the opening of regional office for this purpose: see E. Phelan, *Yes and Albert Thomas* (NY: Columbia, 1949), pp. 39-45. There is significant scope for more work on this area.

<sup>37</sup> *Defending Values, promoting change. Social Justice in a global economy: An ILO Agenda*, (Geneva: ILO, 1994), p. 41.

<sup>38</sup> *Ibid.*, p. 51.

<sup>39</sup> *Ibid.*, p. 58.

<sup>40</sup> At its first meeting the Working Party quickly became stymied by an acrimonious social clause debate: GB.261/11/31; interview with Mr Guy Ryder, Director, ACTRAV, ILO Geneva, 2 November 1998. Also see *Sharing Responsibilities for Labour Standards and Trade Liberalisation* (Geneva: Quaker Office Geneva, 1998), p. 6.

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Four modest and largely unrelated initiatives were undertaken. First, the WP/SDL embarked on an overview of the work of other international organisations in the area of the social effects of globalisation.<sup>41</sup> Second, in May 1995 the Director General launched a personal campaign for increased ratifications of the 'fundamental' ILO conventions, asking countries that had not done so to ratify all such conventions, to give a timetable for ratification or to say why ratification was not planned.<sup>42</sup> Third, the Governing Body asked the Office for a report on how ILO supervisory mechanisms could be strengthened.<sup>43</sup> Finally, WDSL embarked on a series of country studies to study the social effects of globalisation and trade liberalisation on the attainment of the ILO's social objects'.<sup>44</sup>

These disparate largely half-hearted efforts of the ILO became clearly inadequate after the December 1996 meeting of WTO trade ministers in Singapore. Having managed to include the issue of labour standards on the agenda of such a meeting for the first time, the United States and other proponents<sup>45</sup> of a link between trade and labour standards failed to overcome the opposition of countries of the South after a highly charged meeting.<sup>46</sup> The resulting Ministerial Declaration squarely put the task of addressing labour standard problems in the ILO's arena:

The International Labour Organisation is the competent body to set and deal with [international labour] standards.<sup>47</sup>

Clearly unable to ignore such an unambiguous challenge,<sup>48</sup> the Director General and the

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<sup>41</sup> GB.262/WP/SDL/Inf.4.

<sup>42</sup> GB.262/LILS/4. For the latest results of the campaign see GB.274/LILS/5 para. 1.

<sup>43</sup> GB.262/205 para. 40.

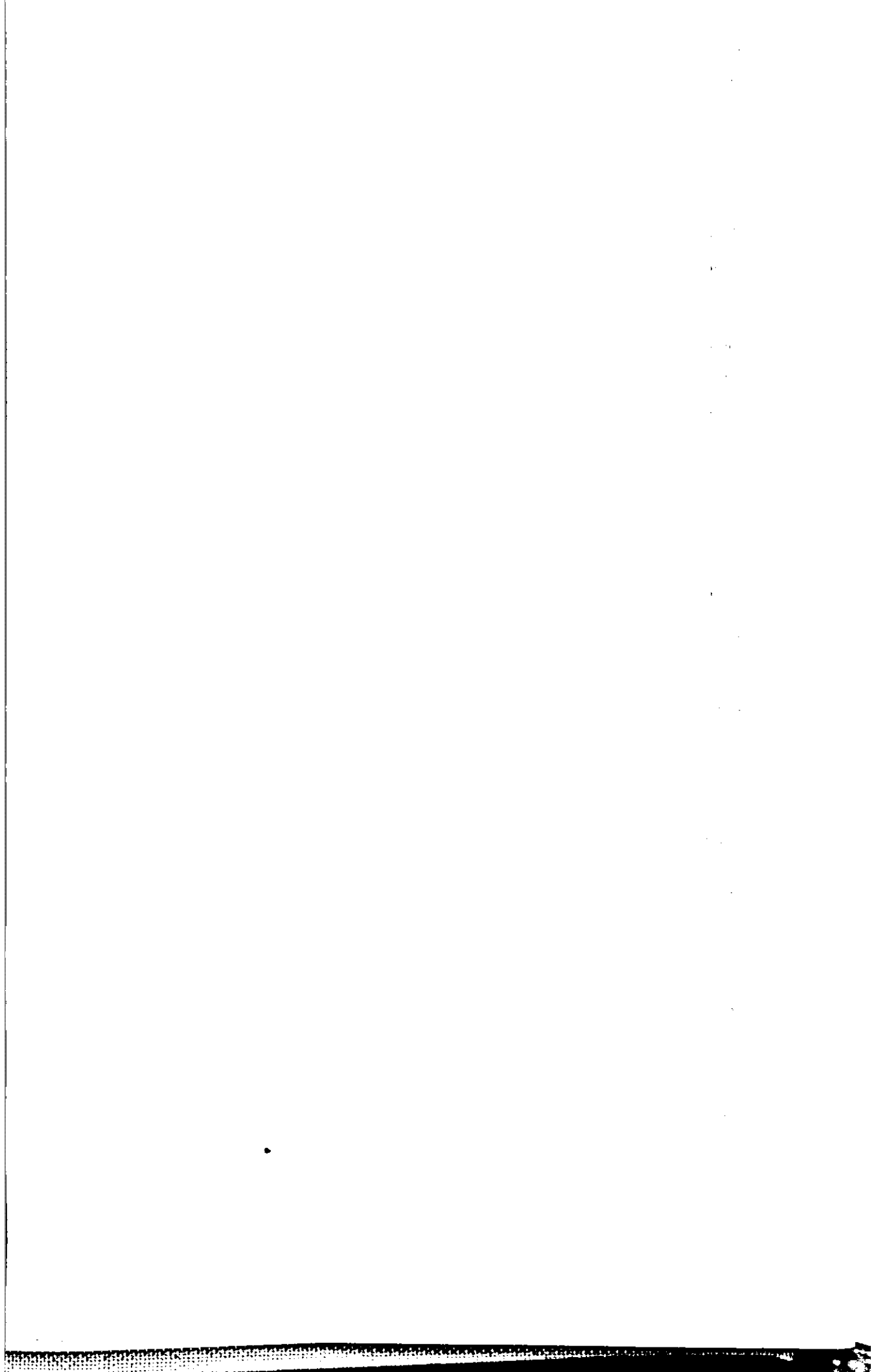
<sup>44</sup> GB.267/WD/SDL/1/1. For a recent overview of this initiative see GB.274/WP/SDL/2.

<sup>45</sup> In particular Finland, France, Germany, the Netherlands, and Norway. See <http://www.wto.org/wto/archives/wtodec.htm>.

<sup>46</sup> The level of sensitivity can be gauged from the fact that an invitation the ILO Director General to attend was withdrawn at the last minute: see GB.268/WP/SDL/1/3 para. 2.

<sup>47</sup> World Trade Organisation, Ministerial Declaration, para. 4. WT/MIN(96)/DEC/W 13 December 1996.

<sup>48</sup> The imperative for action was clearly perceived by the Office (see L. Swepston 'Introductory Note' 37 *ILM* 1233 (1998), p. 1234), by the majority of the members of the Governing Body (see GB.270/3/2 para. 3: 'Virtually all speakers considered that the time had come for a shift in the



Office focussed a large part of their preparations for the 1997 ILC on the question of how the ILO would shore up support for international labour standards having been denied the possibility of a coercive link with trade privileges. In his report to the ILC of June 1997 entitled *The ILO, standard setting and globalization*, then-Director General Michel Hansenne proposed to the Organisations' constituents two initiatives to respond to the WTO's challenge. The first was that:

[a] declaration or any other text enshrining principles adopted by the Conference might help to define the universally acknowledged content of the fundamental rights which should be respected by all Members of the Organization, whether or not they have ratified the corresponding Conventions, and to establish a mechanism to guarantee their promotion.<sup>49</sup>

The second was the idea of a ILO-run "global social labelling" system that would allow member states to affix to products and services originating in their jurisdictions a label certifying that the product or service had been produced in accordance with fundamental ILO conventions.<sup>50</sup> This latter proposal met with varying degrees of opposition from all of the tripartite constituents,<sup>51</sup> but in particular from the employers who saw the proposal leading to "an internationally sanctioned means to implement a consumer boycott".<sup>52</sup> The employers group subsequently focused on the idea of a document that would 'affirm' member states' obligations to respect 'core rights' using existing the ILO mandate and procedures. Other actors had problems with this initiative.<sup>53</sup> Why expend

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emphasis of the ILO's standard-setting activities in the light of the globalization of the economy'), and by the employers:

Le but est de donner un signal que l'OIT se reveille. On abandonne la clause sociale mais, l'OIT se mobilise autrement pour assurer que le progrès économique n'est pas la jungle: interview with Jean-Jacques Oechslin, former President Organisation internationale des employeurs 30 June 1998.

<sup>49</sup> *The ILO, standard setting and globalization: Report of the Director-General to the International Labour Conference 85th Session 1997*, (Geneva: ILO, 1997), p. 26.

<sup>50</sup> *Ibid*, p. 31.

<sup>51</sup> See Reply by the Director-General of the International Labour Office to the discussion of his Report, at <http://www.ilo.org/public/english/10ilc/ilc85/dgrep.htm> and GB.270/3/2 paras 8-10.

<sup>52</sup> See <http://www.uscib.org/news/pressrel.htm>.

<sup>53</sup> The most strident having problems with both proposals: 'We are therefore compelled to state in unequivocal terms that the idea of a declaration and that of the overall social label are not acceptable': Submission of the Pakistani Employer's delegate during the Discussion of the



energy on a instrument which merely outlines what member states are already obliged to do? If it is still not linked to trade sanctions then how will it further the social clause debate? And how will this new instrument fit into the ILO standards system? Would not a new follow-up mechanism raise the possibility of a country being subject to 'double scrutiny',<sup>54</sup> on the same issue?

Despite these reservations the initiative was placed on the agenda for the 1998 ILC by the Governing Body and negotiations of the text commenced under the stewardship of Canada. The debate on the draft text of the Declaration at the 1998 ILC highlighted divisions in the Organisation's constituency: general support for a 'reaffirmation' of members' obligations arising from membership of the ILO, but a strong rejection by a group of member states (led by Egypt and Pakistan) of any new monitoring mechanism or any possibility that the Declaration could be used as a basis for any punitive trade action.<sup>55</sup> These divisions will be relevant to the discussion below. The contention of the

debate in the plenary session is reflected in the fact that the Declaration was adopted on the positive vote of only 38 per cent of eligible delegates.<sup>56</sup> Nonetheless, since its adoption on 18 June 1998, the Declaration has been regarded (at least by the Office) as the third principle instrument of the ILO after the Organisation's constitution and its quasi-constitutive Declaration of Philadelphia.<sup>57</sup>

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Report of the Director-General.

<sup>54</sup> Ms. Janjua (Government adviser, Pakistan), Report of the Committee on the Declaration of Principles Committee report Declaration Submission, discussion and adoption. [hereafter '*Declaration Committee: Submission, discussion and adoption*']. This document can be obtained at <http://www.ilo.org/public/english/10ilc/ilc86/com-decd.htm>.

<sup>55</sup> See the comments of the Egyptian Minister of Manpower in *Declaration Committee: Submission, discussion and adoption*.

<sup>56</sup> Of a total number of 696 voting delegates, the quorum of 264 was surpassed by only 52 members (316). Although no delegate voted against the text, of the 316 votes cast, 43 were abstentions (including government delegates of Myanmar, Syria, Vietnam, Peru, Mexico, Egypt, Kuwait Pakistan and Saudi Arabia): *ibid.* p. 30.

<sup>57</sup> The 1944 Declaration of Philadelphia had the effect of widening the Constitutional foundation of the competence of the Organisation. It was incorporated into the ILO Constitution on the occasion of the constitutional amendments of 1946.





## 2. *What the Declaration purports to do*

In operative terms the Declaration purports to achieve four things. The first is to declare that certain labour rights are to be considered as 'fundamental' or 'core' by the ILO and its membership. The four such 'fundamental rights and principles' are: (a) freedom of association and the effective recognition of the right to collective bargaining (which are taken as being mutually reinforcing); (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. The choice of these rights is said to be based on the fact that these they have been expressed in ILO conventions which are 'recognized as fundamental both inside and outside the Organisation'.<sup>58</sup>

The second is the extension of the obligation to respect and promote these 'fundamental rights' to member states of the Organization that have not ratified the ILO conventions which deal with these rights. This extension is said to be based on the Constitution of Organization (including the Declaration of Philadelphia) which is said to embody these principles. By the voluntary act of joining the Organization and accepting its Constitution, member states are taken to have also accepted the obligation to observe and promote the 'fundamental rights and principles' recognised in the constitutive instruments. Hence, rather than being a new obligation, the Declaration presupposes that this obligation has always existed and thus the constitutes merely a reaffirmation of the position.

The third feature of the Declaration is the establishment of a follow-up mechanism 'to encourage the efforts made by the Members ... to promote the fundamental principles and rights' identified in the Declaration. A framework of the follow-up mechanism is set out in the Annex to the Declaration, the details of which were left to be decided by the Governing Body. The nature of the follow-up procedure is repeatedly stated to be 'promotional'. In line with this 'promotionality', the results of the procedure are to be used in identifying areas where the ILO's assistance 'may prove useful' to members

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<sup>58</sup> Article 1(b).



striving to respect the fundamental rights.

The follow-up is to consist of two reporting procedures. The first focuses on member states which have not ratified the seven conventions which are said to embody the fundamental rights and principles. These members will be asked to report annually on 'efforts made in accordance with the Declaration',<sup>59</sup> that is, their efforts to promote and realise the fundamental rights. These reports ('the Annual Reports') – together with comments on them by domestic social partners – will be compiled by the Office before being reviewed by the Governing Body, with the opportunity for the member states concerned to respond to requests for clarification or further information. The procedure is said to be based on an existing procedure under Article 19.5(e) of the ILO Constitution which allows the Governing Body to request reports from member states on progress made towards ratification of as yet unratified conventions, including difficulties which prevent or delay the ratification of such a convention. A departure from this established procedure is the possibility, under the Declaration, for the Governing Body to appoint a 'group of experts' for the purpose of 'presenting an introduction' to the Annual Reports as compiled by the Secretariat and 'drawing attention to any aspects which might call for a more in-depth discussion'.<sup>60</sup>

While the Annual Reports are country specific, the second follow-up procedure is rights-specific. The 'Global Reports' are to aim at providing a 'dynamic global picture' of each fundamental right, to then be used as a basis for determining priorities for technical assistance within the ILO. Each year one of the four fundamental rights will be addressed, starting in 2000 with Freedom of Association and the Right to Collective Bargaining.<sup>61</sup> The report will be drawn up by the Office, based on information gleaned from (a) the

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<sup>59</sup> Annex Article II. A. 2. The seven relevant Conventions are those on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), Right to Organize and Collective Bargaining Convention, 1949 (No. 98), Forced Labour Convention, 1930 (No. 29), Abolition of Forced Labour Convention, 1957 (No. 105), Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Equal Remuneration Convention, 1951 (No. 100), and Minimum Age Convention, 1973 (No. 138).

<sup>60</sup> Annex Article II. B. 3.



Annual Reports of non-ratifying countries, (b) the established ILO reporting procedure for states that have ratified the relevant conventions,<sup>62</sup> and (c) other information 'gathered and assessed in accordance with established procedures'.<sup>63</sup> Unlike the Annual Report, the Global Report is to be reviewed by the ILC.

A fourth feature of the Declaration is its attempt to characterise its last two-mentioned functions (that is, the extension of convention obligations to non-ratifying states and the follow-up procedure) as being 'promotional' rather than comparative or punitive.<sup>64</sup> This position was laboured in the preparations for the Declaration,<sup>65</sup> during the Committee and plenary debates on the draft text,<sup>66</sup> and in the subsequent Governing Body debates on the format of the follow-up mechanism.<sup>67</sup> This feature was born of the view that the Declaration should neither:

- (1) lead to a new monitoring mechanism for legal obligations but rather focus on targeting ILO assistance to countries attempting to achieve ratification of all fundamental conventions; nor
- (2) facilitate, in the future, any attempt to condition access to international markets on maintenance of a certain level of labour conditions.

This latter view is articulated in Article 5 of the Declaration:

5. [The International Labour Conference] stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its

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<sup>61</sup> GB.274/205 para.6.

<sup>62</sup> Article 22 of the ILO Constitution obliges all ratifying member states to submit periodic reports on measures the state has taken to give effect to the provisions of each ratified convention. See t.a.n. 16. The Governing Body has recently amended the timetable for the delivery of reports under Article 22 so that they arrive in time to be used in the preparation of the Global Reports: GB.274/LILS/3/1 para. 8; GB.274/10/1 and GB.274/205 para. 39. See the further discussion in Part 3.3 below. The sequence for consideration of Global Reports follows the order of fundamental rights as set out in the Declaration: GB.274/205 para. 6.

<sup>63</sup> Annex Article III. B. 1.

<sup>64</sup> Articles 4 and I.2.

<sup>65</sup> See, e.g., GB.270/3/1 paras 25, 26 and 28.

<sup>66</sup> See, e.g., Report of the Committee on the Declaration of Principles paras 21, 22 and 37.

<sup>67</sup> See, e.g., GB.273/3, paras 15 and 16.



follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.

Originally seen as an optional clause, a *bloc* of developing member states (led by Pakistan and Egypt) successfully argued for its inclusion.<sup>68</sup> Article 5 provides a textual link between the Declaration and the WTO Singapore Declaration in that its second limb adopts the wording of the WTO Singapore Declaration.<sup>69</sup>

The notion of a promotional rather than obligatory regime will be discussed in detail in the next section.

### 3. *A critical evaluation of the Declaration*

At the time of writing, the Declaration is a little over one year old. It is still a novel document even within the ILO, and little critical analysis has been published.<sup>70</sup> The aim of this section is to critically evaluate the Declaration in terms of what its purported aims are (base on the text alone) and in terms of what the ILO and its constituents have defined as its goals. The succeeding part will evaluate the Declaration in terms of the ILO's system of international labour standards and the Organisation's mandate.

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<sup>68</sup> *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, International Labour Office, (Geneva, 1998), p. 37 [hereafter 'the Office Background Paper']; *Declaration Committee: Submission, discussion and adoption*, pp. 18, 27, 30.

<sup>69</sup> 'We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put in question.' World Trade Organisation, Ministerial Declaration, para. 4. WT/MIN(96)/DEC/W 13 December 1996.

<sup>70</sup> E. McKeon, *Worker Rights in the Global Economy* (NY: UNA-USA, 1999), pp. 53-57; *Sharing Responsibilities for Labour Standards and Trade Liberalisation* (Geneva: Quaker Office Geneva, 1998); R. Howse, 'The World Trade Organization and the Protection of Workers' Rights', Vol.3 No. 1 *Journal Of Small and Emerging Business Law* (1999) p. 131; M. Rodriguez Piñero-Royo, Editorial, *Relaciones Laborales*, 1999.

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a. *Problems associated with recognising certain rights as fundamental*

The Declaration is built around the notion that certain labour rights and principles are fundamental, and as such, these are to be distinguished from other labour rights and principles regulating work. This notion promotes the adoption of a hierarchy of rights in the field of labour regulation, with the right to organise being accorded 'fundamental' status while, for example, a right to compensation under the *Shipowners' Liability (Sick and Injured Seamen) Convention*<sup>71</sup> is seen as a non-fundamental or 'technical' right.

While it cannot be said that every right enunciated in the international labour code can be said to be a fundamental or human right,<sup>72</sup> nor is it clear that only the four rights outlined in the Declaration are able to be described as fundamental rights, to the exclusion of all others.

The way in which the set of fundamental labour rights is defined is not just crucial to the protection of those rights themselves, but to the whole ILO system of international labour regulation. If the set of 'core' rights is too wide (that is, it encompasses rights that might better be described as procedural or technical rights) then the international labour code is weakened. If one technical right receives greater protection and promotion than another, there is an inevitable downgrading of the importance of the other, if for no other reason than once a right is declared fundamental, it is immune from the critical review to which all rights in all ILO conventions are systematically subjected.<sup>73</sup> A hierarchy among non-fundamental labour rights has been expressly rejected by ILO.<sup>74</sup> If the 'core set' is too narrow (and thus excludes what might be seen as a truly fundamental right) then the according of special status to the core set raises two difficulties. The first derives from the

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<sup>71</sup> ILO Convention No. 55 (1936).

<sup>72</sup> V. Leary 'The Paradox of Workers' Rights as Human Rights' in *Human Rights, Labour Rights and International Trade*, eds. L. Compa and S. Diamond (Philadelphia: Penn, 1996), p. 28.

<sup>73</sup> Revisions of conventions and recommendations are regularly carried out by the ILO to take into account changing circumstances. The current revision, carried out by the Working Party on Policy regarding the Revision of Standards, is almost complete. See GB.274/4(Rev.1).

<sup>74</sup> GB.199/9/22.



notion that fundamental or basic labour rights constitute human rights.<sup>75</sup> If the 'core set' is too narrow and excludes a right which is acknowledged outside the ILO as a human right (for example the right of the child to be protected from economic exploitation<sup>76</sup>) then the damage to both the interdependence and the universality of human rights would extend well beyond the ILO system.

A second difficulty this situation would pose is linked to the first. The vision of Director General Hansenne of the role of the Declaration was to settle certain immutable and non-negotiable standards in the 'jungle' of globalisation. This is articulated in the preamble to the Declaration:

Whereas it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application

The implication is that other rights and standards laid down in the international labour code are negotiable and may change over time. This implication is reinforced by recent constitutional changes within the ILO. Although a ratifying member state has always been able (subject to certain timetable conditions) to denounce a convention, only lately has the ILC itself been empowered to withdraw or abrogate conventions.<sup>77</sup> Much of impetus for this change comes from the campaign to revise and rationalise ILO conventions which has been pursued by the ILO at the urging of its constituents.<sup>78</sup> Taken together, these views suggest a consensus that the future of international labour standards

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<sup>75</sup> Valticos & von Potobsky, pp. 127-129.

<sup>76</sup> See Article 32, Convention on the Rights of the Child, GA Res.44/25 of 20.11.89.

<sup>77</sup> See Provisional Record Nos 15 and 15A, ILC 85<sup>th</sup> Session and GB.270/LILS/1. A convention is *withdrawn* if no ratifications have been registered, *abrogated* if otherwise. There are other ways in which a convention can be abrogated, for example, pursuant to its own terms.

<sup>78</sup> See International Organisation of Employers, *Position paper: Proposals for a thorough reform of the ILO* (February 1993) paras 15 and 16; *How to Achieve Labour Standards*, Statement of the Non-Aligned Movement Geneva, 10 June 1997; Frances Williams, 'The ILO feels its age', *Financial Times* 2 June 1998 and 'Soft Bark and not Much of a Bite: Examining the Growing Debate over the Effectiveness and Priorities of the ILO', *Financial Times*, 2 June 1993. As a result of such views in the Governing Body, the Working Party on Policy regarding the Revision of Standards was set up in March 1996 with a mandate to propose reforms of the process for revision of standards: GB.267/LILS/WP/PRS/2, Annex.



lie in a system of non-negotiable core standards and flexible non-fundamental standards.<sup>79</sup> If this prophecy is true then a narrow set of core standards which excluded certain human rights and left them in the sphere of flexible or negotiable standards, would start off the new system on a flawed basis and have a grave effect on the protection of all labour rights, which will increasingly be seen to flow from this core set..

How valid are the criteria by which the four rights set out in the Declaration have been chosen as being fundamental? Has their choice been to the exclusion of other fundamental rights? It is not immediately apparent from the text of the Declaration how the four fundamental rights have been chosen. They are said to be based on certain 'principles and rights set out in [the] Constitution and in the Declaration of Philadelphia' and in certain ILO conventions, the latter having been 'recognized as fundamental both inside and outside the Organization'. Problems with each of these bases which will be discussed below.

Within the field of international labour regulation, the idea that certain labour rights are more fundamental than others is not new. The ILO itself maintains a classification of its conventions and recommendations under 13 categories, of which 'basic human rights instruments' is the first.<sup>80</sup> Indeed, according to the Governing Body, '[t]here has been informal agreement on the question of what are the fundamental rights ... since at least the 1960s'.<sup>81</sup> However, before advent of the Declaration, the ILO's catalogue of fundamental rights ran to three, child labour being excluded.<sup>82</sup> This contrasted with

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<sup>79</sup> This would certainly accord with the current neoliberal economic call for flexibility in employment conditions:

[L]abour flexibility has found near universal acceptance as a panacea for the assumed inefficiency of Australian workplaces and preexisting forms of labour market regulation and come to dominate debates concerning the future of industrial relations policy. Indeed, it is no exaggeration to suggest that the 'imperative' of labour flexibility has become an article of faith among employers, governments and unions.

*Employment security* (eds. R. McCallum, G. McCarry, P. Ronfeldt) (Sydney : Federation Press, 1994), p.7.

<sup>80</sup> See *Classified guide to international labour standards*, (Geneva, 1995).

<sup>81</sup> GB.267/LILS/5 para. 16 which refers to GB.148/9/8.

<sup>82</sup> In the Governing Body 'there a clear understanding ... that the three principal human rights

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approaches taken outside the Organisation. While other commentators and organisations have promoted the idea that certain labour rights, such as the right to freedom of association, are rights contained in the Universal Declaration of Human Rights and should be regarded in a manner different from other labour rights, for example a right to a certain level of remuneration in a specific sector of industry,<sup>83</sup> there has been little consensus.

At the *inclusive* end of this spectrum, basic labour rights are said to include all labour related rights appearing in the Universal Declaration of Human Rights and the two international human rights covenants.<sup>84</sup> This definition would include: the right not to be subjected to forced labour, the right to work, the right to just and favourable conditions of work (including fair wages and safe and healthy working conditions), the right to equal pay for equal work, the right to form trade unions, the right to rest and leisure and reasonable limitation of working hours, and the right to protection against unemployment.

A more exclusive view would include just freedom of association and a prohibition on forced labour, the reasoning being that these principles enjoy the widest consensus, that differing levels of development or resources among societies should not affect their application and that with a freedom to associate, other rights can be secured.<sup>85</sup> Between these extremes, the contents of cores sets varied widely. Some commentators included child labour but also include workplace health and safety.<sup>86</sup> Yet others restricted child labour to *exploitative* child labour.<sup>87</sup> Even an internal ILO working party was inconsistent in including child labour but excluding non-discrimination.<sup>88</sup> Further, the content of individual rights was often unclear, as we shall see later in respect to freedom of association and child labour.

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with which the ILO was concerned were freedom of association, discrimination and forced labour': GB.267/LILS/5 footnote 14.

<sup>83</sup> See G. Fields, *Trade and Labour Standards: a review of the issues* (Paris: Pedone, 1994); OECD Report.

<sup>84</sup> The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (UN Doc. A/RES/2200).

<sup>85</sup> Leary, 'The Paradox of Workers' Rights as Human Rights', p. 38.

<sup>86</sup> Fields, 1994.

<sup>87</sup> OECD Report, p.26.

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In positioning itself in this debate, the ILO itself constrained in two (related) ways. First, it felt itself bound to not stray beyond fundamental rights on which there was a high degree of consensus stretching beyond the Organisation. Second, it also claimed that the method it chose of 'declaring' the 'fundamentality' of rights depended on the rights themselves having been entrenched in the Organisation's constitution. Both of these perceived limitations appear suspect and they will be examined below and in Part 3.

In arriving at the set of core rights in the Declaration, the ILO was heavily influenced by three documents, and it is on these three documents that the assertion in the Declaration that certain ILO conventions are 'recognized as fundamental both inside and *outside* the Organization' is based.<sup>89</sup> The first is the Declaration of the World Summit for Social Development of 12 March 1995 in which, as outlined above, 190 member states of the United Nations (including almost all ILO member states) committed themselves to 'freely promote respect for relevant International Labour Organization conventions, including those on the: prohibition of forced and child labour, the freedom of association, the right to organise and bargain collectively, and the principle of non-discrimination'.<sup>90</sup> The second was the 1996 report by the OECD Secretariat, *Employment and Labour Standards: A study of core worker rights and international trade* which, after considering the various definitions of fundamental rights, arrived at the set which appears in the Declaration (though focusing on *exploitative* child labour rather than child labour *per se*).

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<sup>88</sup> GB.261/WP/SDL/1 (November 1994).

<sup>89</sup> Emphasis added. See the Office Background Paper, pp. 12-15.

<sup>90</sup> Copenhagen Declaration on Social Development of 12 March 1995, Commitment 3(i). Likewise Copenhagen Declaration on Social Development of 12 March 1995 the summit's Programme of Action called on Governments to 'enhance the quality of work and employment by: ... (b) Safeguarding and promoting respect for basic workers' rights, including the prohibition of forced labour and child labour, freedom of association and the right to organize and bargain collectively, equal remuneration for men and women for work of equal value, and non-discrimination in employment, fully implementing the conventions of the International Labour Organization (ILO) in the case of States parties to those conventions, and taking into account the principles embodied in those conventions in the case of those countries that are not States parties to thus achieve truly sustained economic growth and sustainable development.' An issue arises as to whether non-discrimination covers the notion of equal work for equal value and if so, why it is mentioned separately in the Copenhagen Summit documents but not in the Declaration.



The (third) was the Singapore Ministerial Declaration of the WTO Trade Ministers of 13 December 1996<sup>91</sup> which recognised that the 'ILO is the competent body to set and deal' with 'internationally recognised core labour standards'. These standards are not set out, but the phrase is accepted to refer to the Copenhagen Summit Declaration and Programme of Action.

Another factor in the choice of fundamental rights was the level of ratification of the related ILO conventions. The six of the seven fundamental conventions on which the Declaration is built are among the most ratified of all ILO conventions. The seven together have registered 853 ratifications, on average 70 percent of member states having ratified each convention. Universal ratification would require only 356 further ratifications.<sup>92</sup> Indeed, this was the basis for the Director General's personal campaign for universal ratification of these seven conventions, a campaign which explicitly acted on the Copenhagen Declaration and Programme of Action.<sup>93</sup>

Hence it is convincingly argued by the ILO<sup>94</sup> that the four fundamental rights appearing in the Declaration reflect, if not a universal consensus, then a consensus among ILO member states. At first this might be seen as a dynamic approach, in which further rights can be declared fundamental as consensus moves forward. However the adoption of a 'Declaration' containing four specific and limited rights (compared to a comprehensive list in, for example, the Universal Declaration) will more likely retard any progress in consensus in the short term. The Declaration will no doubt provide a platform

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<sup>91</sup> 'We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organisation (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put in question. In this regard we note that the WTO and the ILO Secretariats will continue their existing collaboration.' World Trade Organisation, Ministerial Declaration, para. 4. WT/MIN(96)/DEC/W 13 December 1996.

<sup>92</sup> *Report of the Director General: Activities of the ILO 1998-99* (Geneva, 1999) p.2.

<sup>93</sup> *Report of the Director General: Activities of the ILO 1994-95* (Geneva, 1996) p. 8-9.

<sup>94</sup> Office Background Paper, pp. 12-15.



from which the acceptance of new fundamental rights can be secured in the future. But the document will also provide a ready answer for those seeking to frustrate such an extension for some time.

Even if we accept that the core set of rights contained in the Declaration reflects a contemporary consensus, differences still exist concerning the substantive content of each of these four rights which could impact of the way in which the Declaration works in practice. Some may not be very contentious. For example the question of whether the omission of the principle of equal pay for work of equal value means that this principle is not seen as fundamental, or whether it is adequately covered by the principle of non-discrimination in employment (the two had earlier been distinguished both within and outside the ILO<sup>95</sup>). More contentious are the question of freedom of association and the question of child labour. Freedom of association and the right to collective bargaining are seen by some to include the right to strike, and by others to exclude the right to strike.

The international consensus on which the Declaration is based does not assist in deciding whether the right to strike forms part of the fundamental principle of freedom of association.<sup>96</sup> This issue will be discussed in greater detail in next section.

- The child labour issue is part of a broader debate currently taking place in the ILO, and hence the approach of the Declaration is very important in judging the future direction of the broader debate. In essence the issue is whether the work of people below a certain age is to be prohibited altogether, or whether some flexibility should be introduced to take into account non-exploitative child labour and avoid the adverse effects of a blanket proscription (for example the forcing of children from legitimate employment into prostitution and the unregulated parallel economy).<sup>97</sup> Before the adoption of the

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<sup>95</sup> See note 90 above.

<sup>96</sup> The International Covenant on Economic, Social and Cultural Rights expressly recognises the right to strike in the provision dealing with freedom of association (Article 8.1).

<sup>97</sup> The literature is vast. See A. Lefebvre *Islam, human rights and child labour in Pakistan* (Copenhagen: NIAS Books, 1995); M. Black, *In the twilight zone child workers in the hotel, tourism and catering industry*, (Geneva: ILO, 1995); International Confederation of Free Trade Unions, *Breaking down the wall of silence how to combat child labour* (Brussels: The



Declaration, the ILO had promoted the 'elimination' of child labour,<sup>98</sup> while, for example, the OECD Report adopted a proscription on 'exploitative' child labour.<sup>99</sup> While the use of the phrase 'effective abolition of child labour' in the Declaration may represent a compromise between the two views, the records of debate on the Declaration in the conference show that it is intended to focus on exploitative forms of labour.<sup>100</sup> Considering this debate, it is not clear that the inclusion of 'effective abolition of child labour' reflects the consensus on which the Declaration is based, certain (notably Northern) member states seeing the fundamental principle as being the elimination of child labour. One might of course see the outcome as being the lowest common denominator.

This uncertainty regarding the contents of the fundamental rights is exacerbated by the way in which the Declaration links rights to specific ILO conventions.

*b. Linking rights to the conventions: do the conventions reflect the rights or the rights reflect the conventions?*

The idea that the four rights set out in the Declaration reflect a consensus on labour rights which are also human rights is weakened by the introduction of references to ILO conventions. For while the obligation placed on the membership is to 'respect ... the principles concerning the fundamental rights which are the subject of those conventions',<sup>101</sup> the 'fundamental rights' themselves are defined by reference to ILO conventions. Thus Article 1(b) states that the fundamental rights and principles set out in the Constitution:

... have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the

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Confederation, 1985); J. Boyden, B. Ling and W. Myers, *What Works for Working Children*, (Florence: UNICEF/Radda Barnen, 1998).

<sup>98</sup> GB.261/WP/SDL/1 (November 1994).

<sup>99</sup> OECD Report, p. 26.

<sup>100</sup> *Declaration Committee: Submission, discussion and adoption*, p. 3 (Amb. Moher).

<sup>101</sup> Article 2.

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## Organization.

This shift from 'fundamental rights' *simpliciter* to fundamental rights as defined by the ILO conventions underpins the balance of the document and the follow-up mechanism. Hence, the obligation to assist members placed on the ILO in Article 3 is focused on assistance with the goal of ratification of the relevant conventions. Similarly, the follow-up mechanism is based on reporting procedures in respect of the specific conventions, rather than just the fundamental rights.

The confusion thus introduced is whether all rights contained in the seven relevant ILO conventions are now to be considered fundamental. Some rights conferred by the conventions (or through their practice) might well go further than the four fundamental rights outlined in Article 2 of the Declaration. A clear example is ILO Convention 87 on the Freedom of Association and Protection of the Right to Organise Convention. This Convention stipulates that workers must have the right to establish and join organisations of their own choosing. It goes on to lay down the rights of these organisations to draw their own constitutions, formulate programmes, elect officers etc. A member state which agrees with the fundamental right to freedom of association would be hard pressed to argue that these rights contained in the Convention go further than the fundamental right. However both the Committee on Freedom of Association (the Convention's supervisory body) and the Committee of Experts (which oversees ILO conventions as a whole) consider that, with certain exceptions, the right to strike forms an integral part of the rights conferred by this convention.<sup>102</sup> The Convention itself is silent on the question of the right to strike. Thus in defining the right of freedom of association by reference to, *inter alia*, Convention 87, the Declaration may well extend 'fundamental' status to the right to strike. That this outcome would not be supported by many member states is evidenced by the continuing resistance of many governments to the two committees' reading of Convention 87.<sup>103</sup>

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<sup>102</sup> See Rep. Com. Exp. 1994 Chapter V; *Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO* (Geneva, 1985); Valticos & von Potobsky, p. 98.

<sup>103</sup> See Ben-Israel, pp. 64-70; J. Hodges-Aeberhard, and A. Odero De Dios, 'Principles of the Committee on Freedom of Association concerning strikes', 126 *International Labour Review*, p.



Perhaps more acutely, the problem has arisen again (but this time after the adoption of the Declaration) with the adoption by the 1999 ILC of the *Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour* (Convention No. 182) and the accompanying Recommendation (Recommendation 190). This Convention does not replace the earlier ILO convention dealing with child labour (*Minimum Age Convention*, 1973 (Convention 138)), but contributes to the child labour debate by identifying those areas of child labour that should be proscribed without delay.<sup>104</sup> These can be summarised as being (a) forced or compulsory labour, (b) prostitution or the production of pornography, (c) use for illicit activities, in particular for the production and trafficking of drugs, and (d) work likely to harm the health, safety or morals of children.

One would imagine these principles would clearly fall within the Declaration's call for the 'effective abolition of child labour' (even more so than those contained in Convention 138)<sup>105</sup> and that the seven conventions on which the Declaration is based would henceforth be eight. This was the view of many governments in recommending Convention 182 to the ILC for adoption.<sup>106</sup> However this is not, for the moment, the case.

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37; P. Hoefler-Van Dongen, 'The right to strike within the framework of the ILO', *Netherlands Int'l L. Rev.* (Special Issue 1/2) pp. 109-119 (1977); Valticos & von Potobsky, p. 308.

<sup>104</sup> Convention 138 obliges states to set a minimum age for entry into the workforce as part of 'a national policy designed to ensure the effective abolition of child labour': Article 1. States cannot set a minimum age below 14 years for entry into the workforce (Articles 4 and 5). In light of the definition of child as a person under the age of 18 years in both Convention 182 and the UN Convention on the Rights of the Child (GA Res. 44/25), Convention 138 cannot be seen to impose an absolute obligation on states to abolish child labour.

<sup>105</sup> See the opinion of the ILO Legal Advisor during the debate on the Declaration at the ILC: 'The Legal Adviser stated again that the expression 'effective abolition of child labour' could, and must be, understood in a promotional and progressive sense which was indeed also reflected in the definition of Article 1 of Convention No. 138 to the extent that the Convention itself recognized that certain forms of child labour did not fall within its scope or might be excluded in certain circumstances. It was clear a fortiori that the Declaration did not require Members to eliminate such forms of child labour or similar forms'. *Declaration Committee: Submission, discussion and adoption*, p. 2.

<sup>106</sup> See *Report of the Committee on Child Labour* paras 18, 30 39 and 44; *Declaration Committee: Submission, discussion and adoption* (Statements by the Governments of the Netherlands and Denmark).

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The only textual link between the Declaration and Convention 182 appears in the preambular paragraph of Convention 182 that merely 'recalls' the Declaration. The preparations for the coming into force of the Declaration's follow-up mechanism have not once addressed the issue of Convention 182. It may be argued that until Convention 182 was adopted in June 1998, there was little sense in considering its effect on the Declaration. However considering the fact that Convention 182 attracted an extraordinary level of consensus such that it is one of the rare ILO conventions which was negotiated over two years without one record vote having to be called, it would seem wilfully short-sighted to ignore it in the construction of the Declaration machinery.

Worse, as it stands, there will be some difficulty in incorporating Convention 182 into this machinery. The Global Report under the Declaration follow-up procedure will address child labour in 2002.<sup>107</sup> To ensure they are taken into account in this report, the scheduled periodical reports under Article 22 from member states on Convention 138 have been brought forward to 2000. No similar provision has been made for Article 22 reports on Convention 182, and hence there will be no information on the areas covered by Convention 182 in the 2002 Global Report on Child Labour. It is true that Convention 182 will only come into force 12 months after ratification by two member states,<sup>108</sup> and that to schedule reports before the convention is even in force might be seen to be foolish. Again, however, Convention 182 is no normal convention. It is the first convention dealing with fundamental rights to be adopted in over twenty years,<sup>109</sup> and, as a consequence of the high level of consensus it attracted as outlined above, it is also expected to quickly achieve a high rate of ratifications. Immediate ratification was urged by both employers and workers,<sup>110</sup> while many governments representatives<sup>111</sup> undertook to commence the ratification process as soon as practicable, most notably President

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<sup>107</sup> See t.a.n. 61.

<sup>108</sup> Article 10(2).

<sup>109</sup> The last was the Labour Relations (Public Service) Convention, 1978 (C151) which deals with public employees' right to organise.

<sup>110</sup> See the comments of the Employer and Worker Vice-Chairpersons of the Committee on Child Labour, *Submission, discussion and adoption*, 1999 ILC Geneva.

<sup>111</sup> In particular, Switzerland, Denmark and Germany.



Clinton the United States.<sup>112</sup> In these circumstances, it seems reasonable to assume that the convention will soon achieve the required two ratifications for entry into force. The Governing Body's failure to schedule the first Global Report on Child labour until 2004 or even 2003 to allow for Convention 182 matters to be considered seems to indicate that Convention 182 is not considered to be a fundamental convention.

The view of the Office, however, is that the Declaration binds states in relation to principles rather than conventions. Discussing these principles in an introductory note to the text of the Declaration published in *International Legal Materials*, a senior ILO *fonctionnaire* wrote:

This does not mean that the Conventions the ILO has adopted to develop these principles will be extended to member states which have not ratified them. It means rather that States have an obligation to pursue the realization of principles in ways appropriate to their own situation, and to report regularly on how they do so.<sup>113</sup>

Likewise, the Office has suggested that the ILC Standing Orders be amended to accommodate the discussion of the Annual Report envisaged by the Declaration. This is because the relevant provision in the Standing Orders currently refers to a discussion of information 'concerning Conventions and Recommendations'.<sup>114</sup> According to the Office, because the Annual Reports contain information relating to the fundamental rights rather than 'Conventions and Recommendations', an amendment is required.<sup>115</sup>

But the views of the Office are not definitive of the current position, and certainly do not necessarily foresee how the Declaration will work in practice. It is instructive to look deeper into the genesis of the Declaration. In Part 3 we saw that both the Declaration and ILO engagement of private initiatives was grounded in the Director General Hansenne's

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<sup>112</sup> See the text of President Clinton's address to the ILC at <http://www.ilo.org/public/english/10ilc/ilc87/a-clinto.htm>. President Clinton transmitted Convention 182 to the US Senate for ratification on 9 August 1999 (M2 Presswire, August 10, 1999).

<sup>113</sup> Swepston, *ILM*.

<sup>114</sup> Article 7, paragraph 1(b), of the Conference Standing Orders.





1994 call for a strengthening of supervisory procedures in the face of globalisation.<sup>116</sup> The Director General's initial suggestion, which was subsequently the subject of Office research,<sup>117</sup> was the extension of the full Freedom of Association supervisory mechanism to the issues of forced labour and discrimination, on the grounds that these two rights 'are fundamental principles of the ILO, akin to the principle of freedom of association'.<sup>118</sup> It was accepted that, from a legal point of view, this could be achieved on the same reasoning as was subsequently used in extending obligations from the constitutive documents in the Declaration. After considerable research and debate, this option was not followed by the Governing Body, but evolved into the Declaration after member states refused to countenance new supervisory mechanisms.<sup>119</sup> It is far from clear that this evolution shifted the basis of the obligation from *rights in conventions* to *rights reflected in conventions*.

One might also consider the distinction the Declaration makes between member states that have ratified all core conventions and those that have not. Those who have ratified all seven conventions are not required to submit an Annual Report, the reasoning being that their regular periodic reports under Article 22 of the ILO Constitution provide a sufficient method for supervising their activities in the given area. If the fundamental principles being reported on in the Annual Reports are in any way different from the rights contained in the core conventions, then the Declaration cannot be seen to be pursuing its aim of universal ratification of the core conventions, and indeed could significantly weaken the international labour code. To explain, let us take the example of the principle of freedom of association and the right to strike discussed above. If the fundamental principles are narrower than the scope of the rights in the core conventions (so that the principle of freedom of association does *not* include the right to strike), then the Annual Report system will not be able to inquire into a member state's respect of the

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<sup>115</sup> GB.274/LILS/3/1 paras 9-13.

<sup>116</sup> See t.a.n. 37.

<sup>117</sup> GB.264/6.

<sup>118</sup> GB.267/LILS/5 para. 3.

<sup>119</sup> '[T]he existing mechanism on freedom of association is by no means the only model for the promotion of fundamental rights.' GB.267/9/2 para. 48(5).



right to strike. Whereas if the member state has ratified the core convention, its respect of the right to strike will be covered in its periodic Article 22 report. This raises the following incongruous situation. The fundamental principle of freedom of association means different things according to whether or not the member state in question has ratified the relevant core convention. This contradicts the Declaration's constitutional basis that *all* members by reason of their freely joining the ILO, are bound to recognise (amongst other) the principle of freedom of association. If a member state is deemed to be reporting on respect of this principle by submitting Annual Reports under the Declaration, then there is little incentive for that state to ratify the core convention, if all that ratification brings about is an extra obligation to respect and report on the right to strike. ✓

It is not being suggested that the Declaration follow-up mechanism will place on member states the same reporting obligations as they have in relation to conventions they have ratified. However, it appears that it is unclear what role the fundamental conventions play in the scheme of the Declaration, and that this uncertainty could be used to expand the definition of the fundamental principles that member states are being asked to honour. The issue of the right to strike outlined above is but one example. The confused issue of child labour is another possibility: does respecting the principle of 'effective abolition of child labour' require member states to eliminate the use of children in pornography? Without Convention 182 it would be difficult to argue that the obligation on states is to *eliminate* such practices, but if the principle is to be read in light of the fundamental conventions (including Convention 182), then it does.

Indeed this problem had arisen before the Declaration was adopted, with some member states openly accepting the fundamental rights contained in the seven conventions, but refusing to ratify the conventions themselves on the grounds that the conventions themselves go beyond the scope of the fundamental rights.<sup>120</sup> These same governments may now find themselves bound to respect rights in the seven conventions which they do not and never have regarded as fundamental. Again, the consensus on which the

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<sup>120</sup> OECD Report, p. 35.



Declaration is built is weakened.

*c. The use of the constitutive documents to extend obligations*

Assuming that the choice of fundamental rights is well founded and not undermined by the textual link to the conventions, the way in which the obligation to respect the relevant conventions is extended to non-ratifying member states is itself, a first glance, breathtaking. The use of 'general principles' from a constitutive document to ground not only a treaty obligation, but also a supervisory mechanism appears suspect. If it were that easy and desirable, why had it not been done before?

In part, it had been done before. The ILO Committee on Freedom of Association referred to earlier was established in 1950 to deal with complaints of failure to observe the freedom of association conventions (Nos. 87 and 98). Under this machinery complaints can be made not only against member states that have ratified these two conventions, but also against those that have not. The basis for this extension of jurisdiction was that 'because the ILO Constitution lays down the principle of freedom of association, this principle should be observed by all member states by virtue of their membership of the Organization alone'.<sup>121</sup> However radical this innovation was viewed in the 1950s, it is today an accepted part of the ILO supervisory machinery.

The question is whether this manoeuvre can be repeated in respect of the four rights outlined in the Declaration. It is difficult to argue that the right to freedom of association cannot be so extended. It is explicitly referred to in both the Constitution (Preamble) and the Declaration of Philadelphia (Article I(b)), and has been accepted by member states through the Committee on Freedom of Association procedure outlined above. Likewise, the right to collectively bargain is explicitly mentioned in the Declaration Philadelphia (Article III(e)), as is the principle of non-discrimination (Article II(a)).<sup>122</sup>

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<sup>121</sup> Valticos & von Potobsky, p. 295.

<sup>122</sup> 'All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of



However, neither forced labour nor the abolition of child labour are specifically addressed in either of the constitutive documents. A concern over forced labour might be implied from the reference to 'the right to pursue ... material well-being ... in conditions of freedom and dignity',<sup>123</sup> as might a proscription on child labour from a wide reading of the reference to 'the protection of children [and] young persons'.<sup>124</sup> But such a liberal reading of the entire constitutive documents would find many more fundamental rights than the four contained in the Declaration. Indeed the ILO itself has previously noted the difficulty with forced labour:

Clearly, the possibility of instituting a procedure like that for freedom of association in this field runs into difficulties, as neither the Constitution nor the Declaration of Philadelphia specifically refers to forced labour.<sup>125</sup>

Similarly, a proscription on child labour has only very recently been acknowledged as a fundamental right within the ILO sphere. Even in the November 1996 the Governing Body was categorically stating the three fundamental labour rights as being freedom of association, non-discrimination and forced labour.<sup>126</sup> At best, child labour was seen as deriving from a prohibition on forced labour,<sup>127</sup> though it is doubtful that this would be enough to justify its 'fundamentalness' according to the criteria of the Declaration.

It is in respect of forced and child labour, then, that the Declaration relies most heavily on the international consensus outlined in Section 1 above. In these areas the extension of convention obligations goes beyond that used to establish the Committee of Freedom of Association in the 1950s, making this perhaps the most novel aspect of the document. It also makes these areas the most vulnerable to attack as they are totally based on a consensus which, as we have seen in the preceding sections, is at times debatable. The lack of consensus on child labour has been referred to above. And even though the forced

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economic security and equal opportunity;

<sup>123</sup> Declaration of Philadelphia Article II(a).

<sup>124</sup> Preamble to the Constitution.

<sup>125</sup> GB.267/LILS/5 para. 17.

<sup>126</sup> GB.267/LILS/5 para. 16.





labour convention (No. 29) is one of the most widely ratified of all ILO conventions (82% of states have ratified), the continuing failure of certain member states (including the United States) to ratify this convention on the grounds that it does not allow prisons to be privately run,<sup>128</sup> indicates an ongoing difference of opinion.

d. *How 'promotional' is the Declaration?*

A fourth striking feature of the text of the Declaration is a tension between language which suggests something momentous and far-reaching is being established and other references which suggest that the Declaration is merely stating what is already the case and, as an instrument, may well soon become irrelevant.

The very use of an instrument called a 'Declaration' conveys a sense of seriousness to the matters being discussed which is beyond the routine. This is more so the case in the context of the ILO where the use of declarations is extremely rare.<sup>129</sup> In its background paper which accompanied the draft declaration proposed to the Conference, the ILO Secretariat pointed out that 'in the general practice of the organisations of the United Nations system, a declaration may be defined as a "formal and solemn instrument suitable for rare occasions when principles of lasting importance are being enunciated"'.<sup>130</sup> Together with this solemnity, the wording of the Declaration conveys the idea that a solution is being sought for an acute and significant problem. Hence the preambular paragraphs of the Declaration note that:

the ILO should, now more than ever, draw upon all its standard-setting, technical co-operation and research resources in all its areas of competence ... to ensure that, in the context of a global strategy for economic and social

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<sup>127</sup> GB.264/6 para. 2.

<sup>128</sup> See the *Report of the Committee of Experts on the Application of Conventions and Recommendations* (ILO: Geneva, 1999) pp. 108-110 and the discussion of this report in the Committee on the Application of Standards, ILC 1999.

<sup>129</sup> Other than the Declaration of Philadelphia, the only other ILO 'declarations' have been the 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the 1964 Declaration concerning action against Apartheid in South Africa.

<sup>130</sup> Office Background Paper, p. 16.



development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development.

Further, that:

.. it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application.

This image of a problem confronting the Organization and the urgent search for a solution is supported by the background to the adoption of the Declaration: the growing concern over labour standards in both industrialised and non-industrialised countries, the social clause debate, the general recalcitrance of the WTO in failing to address labour issues and that Organization's stated view that a solution to the trade liberalisation-labour standards debate must rest with the ILO.<sup>131</sup> The ILO was being forced to respond to a challenge and the Declaration is its principal response.

This situation is to be contrasted with the view of the Office, many member states and employers representatives, that the Declaration does not by itself establish any rights as fundamental,<sup>132</sup> does not of itself extend the observance of conventions to non-ratifying states,<sup>133</sup> does not of impose *any* new obligations on member states or the other tripartite constituents, nor establish any new supervisory procedures or obligations.<sup>134</sup> Indeed it is the view of the ILO's Legal Advisor that should the Declaration ultimately fulfil its purpose, there will be universal ratification of the seven fundamental conventions, and hence no need for either extending convention obligations to non-ratifying states or for the annual reporting of non-ratifying states under the follow-up mechanism.<sup>135</sup> The

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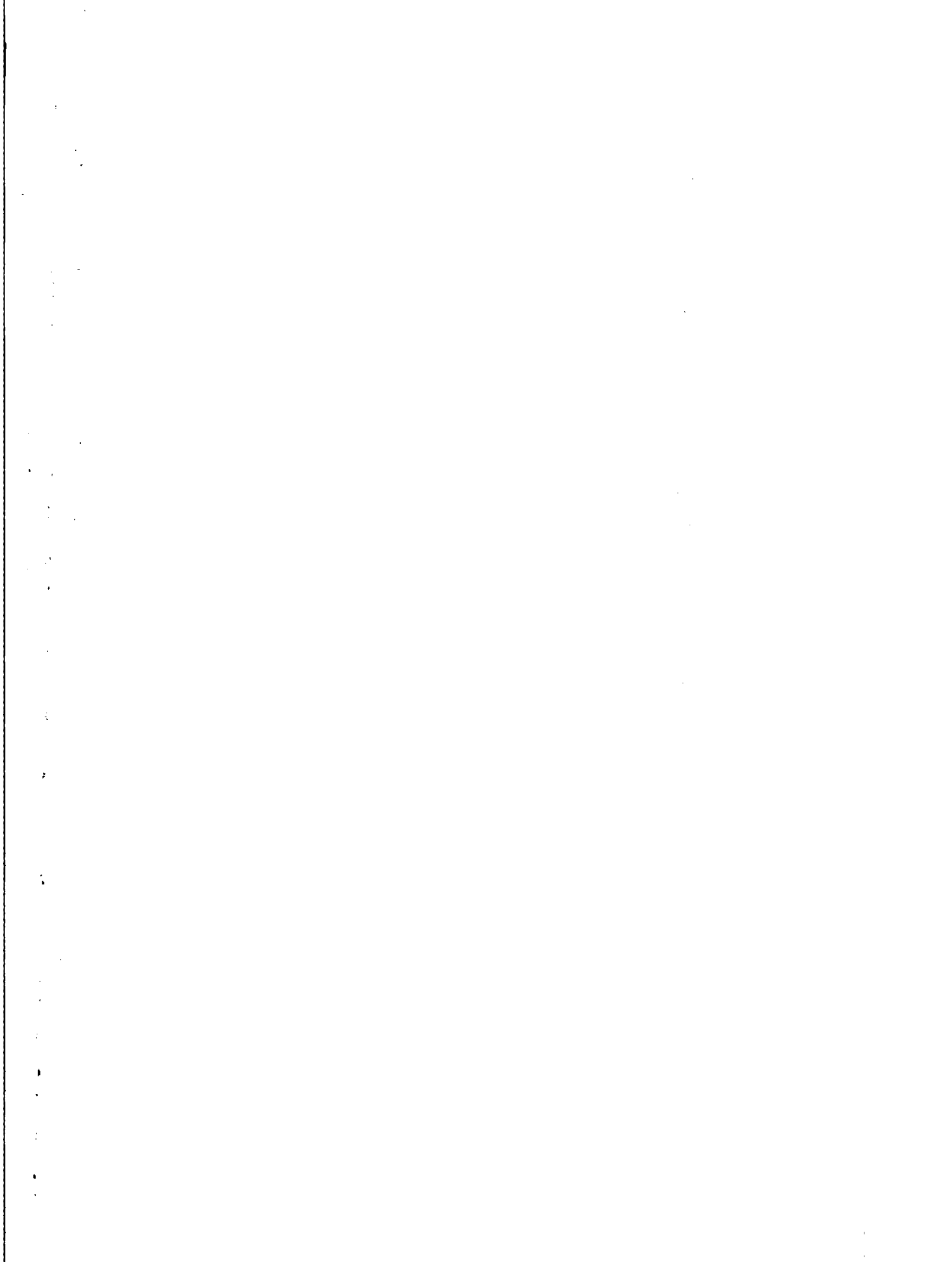
<sup>131</sup> WTO, Ministerial Declaration 13 December 1996, note 91 above.

<sup>132</sup> Office Background Paper, p. 10. See statements by employer (Mr Potter) and government (Mr. Joubert) representatives during the plenary discussion. *Declaration Committee: Submission, discussion and adoption.*

<sup>133</sup> *Ibid.*, p. 18.

<sup>134</sup> *Ibid.*, p. 22. See also the statement of Amb. M. Moher, Chairman of the Committee on the Declaration of Principles: 'No new legal commitments or obligations are incurred through, or by approval of, the Declaration and its follow-up'. *Ibid.*, p. 1.

<sup>135</sup> Interview with Francis Maupain, ILO Legal Advisor, Geneva, 30 November 1998.



Declaration's success will render it otiose.

The cornerstone of this rhetoric is the notion that the Declaration is *promotional* in character. As we saw in Part B this *promotionality* arose from an insistence on the part of certain government and employer members that the Declaration place no new obligations (including no new supervisory mechanisms) on member states. This is partly based on a fear that a non-promotional Declaration could later be used in an attempt to link labour standards with trade based sanctions.<sup>136</sup> This notion of a promotional instrument deserves closer examination.

The idea of promotionality is not new within the ILO system. The term has hitherto been used in two areas of ILO activity, which it can said are combined in the Declaration. The first is the category of 'promotional' conventions.<sup>137</sup> While the greater part of ILO conventions deal with rights that can apply directly to individuals in member states (such as those dealing with allowances or time off), others are more programmatic in nature and call for ratifying states to work towards certain goals, often by means of longer term programmes of action. The clearest example of such a promotional convention is the Employment Policy Convention (No. 122), which places the following obligation on ratifying member states:

With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.<sup>138</sup>

Other examples of promotional conventions include those on social security<sup>139</sup> and discrimination.<sup>140</sup> The rationale behind this form of regulation is that it combines both the consensus approach to standard setting that the ILO has championed since its foundation,

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<sup>136</sup> See t.a.n 68.

<sup>137</sup> For a more detailed discussion see Valticos & von Potobsky, p. 61.

<sup>138</sup> Article 1(1).

<sup>139</sup> Conventions 44, 102, 118, 128, 130 and 157

<sup>140</sup> Conventions 100, 111 and 156.



with a level of flexibility for member states at differing levels of development. This, however, is also the principal criticism of promotional conventions: they try to regulate areas so abstract that it becomes at times impossible for member states to know how to comply with the convention and for the supervisory machinery to evaluate a state's compliance.<sup>141</sup>

The second manifestation of promotionality in the ILO system is in the field of technical assistance. Designed to support the Organisations system of international labour standards, a portion of the ILO's technical assistance programme is devoted to 'promoting' compliance with ILO conventions. These activities include seminars for legislators and the judiciary, advice on how to bring national legislation into conformity with convention obligations, and the publication of handbook and manual of giving effect to convention obligations in the workplace.<sup>142</sup>

These two dimensions of promotionality are synthesised in the Declaration. Rather than seeking an undertaking to implement enforceable rights, the Declaration merely 'encourages the efforts of member states ... to promote ... fundamental principles',<sup>143</sup> while at the same time placing an obligation on the ILO 'to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources'.<sup>144</sup> The one large difference, however, is that even promotional ILO conventions are subject to a critical and comparative supervisory machinery, whereas the Declaration attempts to create a follow-up mechanism which is itself 'promotional'. The inherent contradictions in this scheme will be examined below.

It has been suggested that insistence on a promotional follow-up mechanism has given a

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<sup>141</sup> See *Defending Values*, p. 47-49.

<sup>142</sup> See Galenson, p. 151; Valticos & Potobsky, p. 303.

<sup>143</sup> Article I.1.

<sup>144</sup> Article 3.





political rather than judicial flavour to the procedure.<sup>145</sup> Had the follow-up more closely followed established ILO supervisory mechanisms, compliance would have been secured through respect for the decision of an independent body after an adversarial presentation and response to a given factual situation. As drafted however, the Declaration's follow-up mechanism will rely on political pressure be brought to bear among the tripartite constituents in the Governing Body and the ILC: the publicising of 'poor compliance records of laggard member governments in the hope that public embarrassment will encourage change.'<sup>146</sup> But while it is true that the prospects for coercive change under the Declaration's follow-up mechanism are slight,<sup>147</sup> it is difficult to see the established ILO reporting procedures as relying any less on political pressure and embarrassment. Although the Committee of Experts' reports are comprehensive in scope, the possibility for real sanction is marginal. Beyond issuing a 'request' for more information, an 'observation' on a member state's compliance or a table showing which members are tardy in submission of reports, there is little that can be done.<sup>148</sup> Under the second established reporting procedure, the Conference Committee on the Application of Conventions and Recommendations, the Committee 'selects' cases before the Committee of Experts, invites further responses from the governments involved, then presents a report to the ILC. Again, recalcitrance on the part of governments risks only mild reproach in the ILC. This is not to say that these two procedures have had little effect. Rather, as part of the consensual ILO approach, these procedures rely heavily (almost totally) on the political pressure arising from the public airing of domestic situations among fellow member states, be they policy failures or specific instances.

Whether the Declaration merely reaffirms the *status quo* or whether it will effect a change

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<sup>145</sup> E. McKeon, *Worker Rights in the Global Economy*, p. 59.

<sup>146</sup> *Ibid.* Note that during the drafting of the Declaration, the employer group pushed for a mechanism in which reports submitted by member states would be filtered by the Office so that only cases of persistent policy failure would reach a discussion in the Governing Body while individual and isolated cases would be filtered out: Minutes of 271st Session of the Governing Body Geneva, March 1998.

<sup>147</sup> Though see the arguments below for the way in which the scope of the follow-up might be amplified in practice.

<sup>148</sup> See L. Betten, *International Labour Law: selected issues*, (Deventer: Kluwer, 1993), p. 397.

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in the ILO's relations with its constituents by establishing new obligations will only become apparent once its procedures are operational. There are, however, indications in the follow-up procedure that suggest that it will be difficult to maintain the Declaration as merely a promotional instrument.

Much could be postulated on the potential effect of the two follow-up procedures and how they will effect the established ILO supervisory mechanisms. The drafters of the Declaration are at pains to point out that the follow-up procedures are promotional, and that there is no threat of punitive action against a member state based on these mechanisms. Rather, the results of each reporting procedure are to be used by the ILO to:

identify areas in which the assistance of the Organization through its technical co-operation activities may prove useful to its Members to help them implement these fundamental principles and rights.<sup>149</sup>

Three areas seem, however, to allow these procedures to be used in a confrontational rather than promotional manner.

i. Information sources

The first is the information on which the Global Report is to be based. The Global Report is to be drawn up by the Office primarily using the contents of the Annual Reports and periodic reports submitted to the Committee of Experts. However, the Office may also use 'information gathered and assessed in accordance with established procedures'.<sup>150</sup> On current ILO practice this would not only allow the use of information provided in the form of reports of other international organisations, but also perhaps the use of information provided by non-governmental organisations (NGOs).

NGO involvement in ILO activities has increased markedly over the past five years. A long-time barrier to increased NGO participation in the ILO has been the fear of tripartite

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<sup>149</sup> Annex Article I.2.

<sup>150</sup> Annex Article III.B(1).



constituents (especially worker representatives) that their role in the ILO would be usurped by other civil society actors. Despite this, many ILO procedures are 'porous' to the receipt of NGO information, an example being the recent debates on the new child labour convention.<sup>151</sup> These channels are being formalised, in particular through the loosening of restrictions on NGOs being given observer status at Governing Body and Conference meetings.<sup>152</sup> Judging by commitments made by the former Director General, this process seems sure to continue and accelerate.<sup>153</sup> It is thus not unlikely that the consideration of country specific NGO-provided information will form part of the follow-up process. Although the reporting procedures involve no punitive measures, many governments nonetheless might fail to see a requirement to defend themselves against allegations of international (or even domestic) NGOs in an international forum as 'promotional'.

This possibility did not escape unnoticed during the plenary debates on the Declaration.

Responding to a question posed by the Government member of Pakistan, the ILO Legal Advisor 'confirmed categorically that information provided by NGOs could not be considered as official or as information gathered and assessed in accordance with the procedures referred to under [the follow-up mechanism]'.<sup>154</sup> This was because 'the term "established procedures" was a general reference to procedures providing guarantees of "due process" which, in addition to Articles 19 and 22, concerned Articles 24 and 26 of the Constitution'.<sup>155</sup> Solely on the basis of this exchange, the Governing Body subsequently declared that:

The term "official information" refers to information that is considered as such at the national level, such as official gazettes. Information "gathered and assessed in accordance with established procedures" comprises in general information deriving from procedures that afford guarantees of due process, within both the ILO and other intergovernmental organisations, *on the understanding that*

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<sup>151</sup> Interview with Katherine Hagen, ILO Deputy Director General, 3 December 1998.

<sup>152</sup> *Ibid.*

<sup>153</sup> 1997 Report of the ILO Director-General: *The ILO, standard setting and globalization* (Geneva, 1997), p. 21.

<sup>154</sup> Record of proceedings, 1998 ILC para. 157.

<sup>155</sup> *Ibid.* para. 148.



information from non-governmental organisations is not as such covered by this concept.<sup>156</sup>

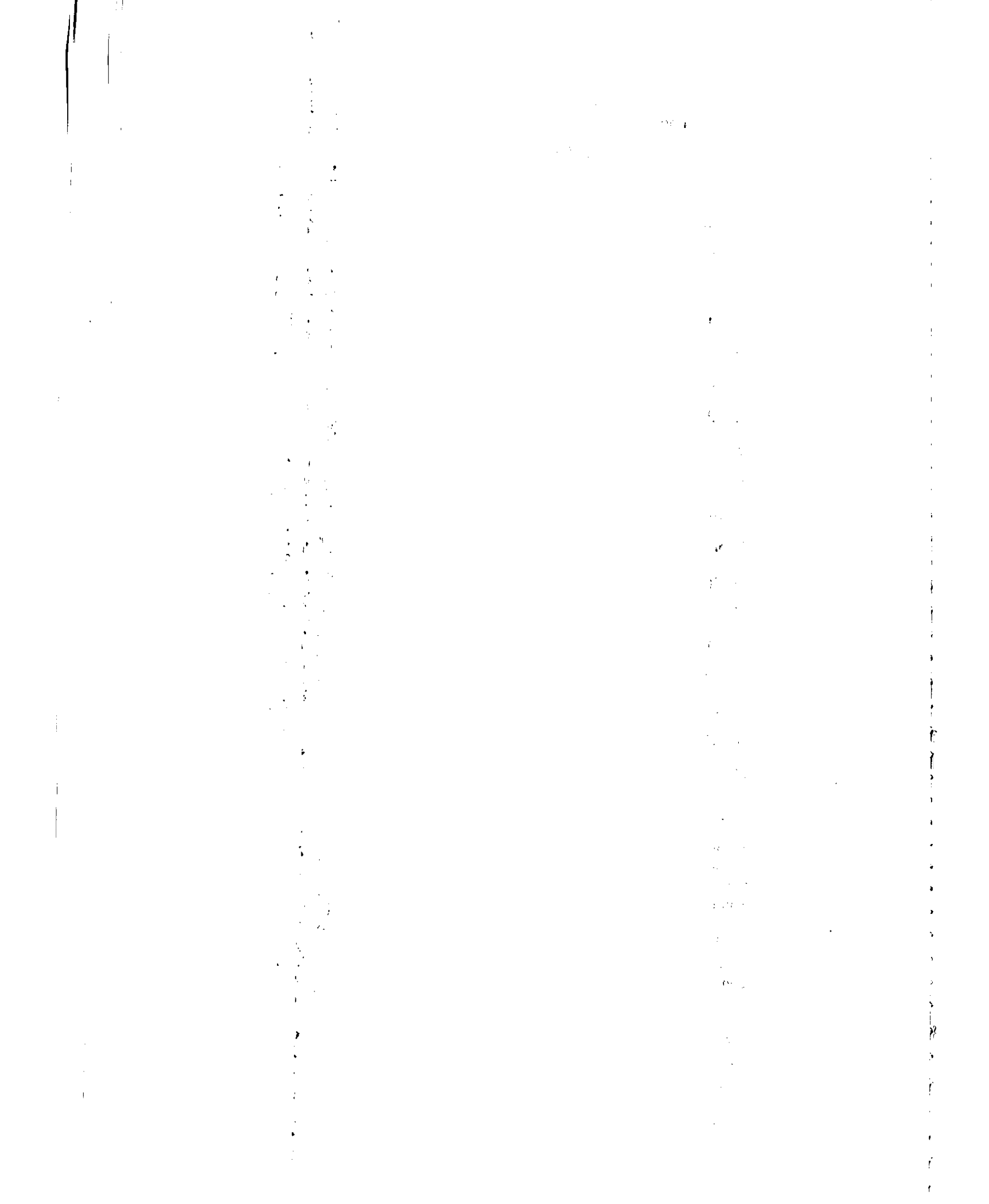
The question is whether these statements are sufficient to exclude NGO-based information from the process. Three points might be made. First, even if the Governing Body position set out above is adhered to, the procedure will still be porous to the reception of NGO information. Despite their general antipathy towards NGO involvement, the most obvious conduit is the worker group. An NGO seeking to present its information to the Director General for inclusion in the Global Report need only find a sympathetic union through which the information can be presented. This manoeuvre has been previously used to great effect in the ILO context.<sup>157</sup> Similarly, much of the information gathered from tripartite constituents, other international organisations and even from within the ILO itself will have a significant NGO-based content.<sup>158</sup> The ILO itself 'may make suitable arrangements for such consultation as it may think desirable with recognised non-governmental international organizations',<sup>159</sup> consultation which again allows the input of NGO information. Presumably such 'suitable arrangements' somehow afford a 'guarantee of due process'. Third, the position of the ILO Legal Advisor and Governing Body are not necessarily definitive, and use of the phrase 'on the understanding' in the Governing Body decision set out above leaves scope for future expansion of the use of NGO information. It must be admitted that the current balance of opinion in both the Governing Body and the Conference would resist such an expansion. However the real power in this area lies with the Director General, not only because of

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<sup>156</sup> GB.274/2 para. 37. Emphasis added.

<sup>157</sup> An striking example is that of the Huichol people's denunciation of Mexico under the ILO Indigenous and Tribal Peoples Convention (Convention No. 169). In keeping with the ILO's strict tripartism, the complaints mechanism under this convention permits only complaints 'from an industrial association of employers or workers' (Article 2.2 of the Governing Body Standing Orders). The Huichol people's complaint was thus rejected for lack of standing. The tribe then approached the local branch of the Mexican National Union of Education Workers (SNTE), which though not directly concerned with indigenous issues, was willing to show solidarity with the Huichol indigenous communities in their claim. The formal complaint made by the SNTE was declared receivable by the Governing Body and a tripartite committee of the inquiry was appointed (GB.270/205 para. 61). Much of the information in this footnote was provide by Luis Rodríguez-Piñero Royo.

<sup>158</sup> One need only look at the reports produced by UNICEF (State of the World's Child, MONEE Report) and UNDP (Human Development Report).





the generally inordinate power of the Office within the ILO,<sup>160</sup> but because of his particular power in relation to the Global Reports, which are to be 'drawn up under the responsibility of the Director General'.<sup>161</sup> A Director General well-disposed towards the use of NGO information could, at the very least, exploit the porous features of the system outlined above.

In this regard it is important to note the changing attitude of the Office towards non-tripartite civil society. The failure of the Organisation to embrace civil society actors has long been criticised.<sup>162</sup> While tripartite members, especially workers, are still resistant to change in this respect, the Office has progressively instituted measures designed to facilitate the input of NGOs. Starting with the recognition of the need to open up to civil society,<sup>163</sup> the Office has steadily built up stronger relations with NGOs, and increased the total number of NGOs with whom it has formalised relations to 155.<sup>164</sup> It is true that most NGO activity within the ILO occurs in the field technical assistance, however current initiatives in the labour standards area are building on previous instances of engagement with civil society, for example the role of NGO information in Commissions of Inquiry.<sup>165</sup>

If, as it appears, the new Director General continues this trend,<sup>166</sup> then it is reasonable to

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<sup>159</sup> ILO Constitution Article 12(3).

<sup>160</sup> See Galenson, p. 98 and following.

<sup>161</sup> Article B.1.

<sup>162</sup> Leary, 'The Paradox of Workers' Rights as Human Rights', p. 37. Cf. Abdul-Karim Tikriti, *Tripartism and the International Labour Organisation*, (Stockholm: SIFIR, 1982) p. 346-348. It is not all the ILO's fault: 'most NGOs have failed to develop strategies to work within the ILO': Leary, 'The Paradox of Workers' Rights as Human Rights', p. 25.

<sup>163</sup> See *Defending Values* at pp. 63-66: "... tripartism, the ILO's most original feature and the source of its strength, constitutes both a limitation and a new opportunity".

<sup>164</sup> These non-tripartite NGOs appear on the so-called Special List, see:

<http://www.ilo.org/public/english/civil/reIngios.htm#asln>

<sup>165</sup> See, for example, the fourteen 'Communications from non-governmental organizations' considered by the Commission of Inquiry into Forced Labour in Myanmar: *Concluding Observations of the recent Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention of 2 July 1998*, p. 4.

<sup>166</sup> In *Decent Work*, his first Report to the ILC, Mr Somavía addressed 'the rise of civil society',

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expect a large amount of pressure to build over the coming years for NGO information to be included in the Global Reports.

## ii. The Group of Experts

A second area in which the promotional nature of the reporting procedures is vulnerable relates to the use of a 'group of experts' to provide 'an introduction to [Annual Reports] ..., drawing attention to any aspects which might call for a more in-depth discussion'.<sup>167</sup> The size and composition of this group was decided by the Governing Body meeting in March 1999. It was decided, *inter alia*, that the group would consist of seven eminent persons who among them have 'the expertise necessary for a correct understanding of the different situations it is called upon to examine, in terms of both from the interdisciplinary nature of the exercise and the diversity of socio-economic circumstances'.<sup>168</sup> Again, there seems to be scope for a critical appraisal by this Group of a member state's performance under one of the fundamental conventions. This is even more likely considering the independence of the experts, who would no doubt feel more at liberty to criticise a government than, for example, the Director General or a tripartite committee. Indeed their mandate to 'draw attention to aspects that seem to call for more in-depth discussion' would seem to facilitate a critical rather than promotional role. This role would be further supported by Article 4 of the Declaration which calls for a follow-up which is 'meaningful and effective'.

Much thus depends on the way in which the role and procedures of the Group of Experts are developed over the coming months. It is surprising that these issues were not laid down with greater specificity in the Declaration, which merely provides:

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and although his conclusions were largely non-committal ('closer links with civil society, if well defined, can be a source of great strength for the ILO and its constituents': p. 43), this might be seen in light of a new Director General's caution in needing to secure the support of the tripartite constituents (especially the workers) for his larger reform programme.

<sup>167</sup> Annex Article II.B(3).

<sup>168</sup> GB.274/2 para. 20.



With a view to presenting an introduction to the reports thus compiled, drawing attention to any aspects which might call for a more in-depth discussion, the Office may call upon a group of experts appointed for this purpose by the Governing Body.<sup>169</sup>

The manner in which the Group of Experts is operationalised by the Governing Body (as always, acting on Office proposals) will have a bearing not only the operation of the Declaration as a whole but also on the integrity of other ILO supervisory mechanisms, in particular the Committee of Experts. Concerned as it is with scrutinising ratifying states compliance with their obligations under ILO conventions, the Committee of Experts not unreasonably fears that a Group of Experts that strays beyond a promotional role will undermine its own role. It is not only the spectre of conflicting pronouncements from the two groups on the same factual situation that concerns the Committee of Experts, but also the wider challenge to the Committee of Experts' pre-eminence in the ILO system since 1927.<sup>170</sup> The mere existence of another independent body within the ILO with a responsibility for the application of labour standards would necessarily lower both the weight of the Committee of Experts' observations (including the persuasiveness of its jurisprudence in other spheres) and its ability to shape ILO policy. It is supportive of the argument made above (that is, that the Group of Experts has the scope to move beyond its promotional mandate) that the Committee of Experts felt sufficiently concerned to raise the matter in their 1999 annual report to the ILC:

The Committee notes that the follow-up mechanism is not intended to be a substitute for the established supervisory mechanisms nor will it impede their functioning. The Committee notes the need for care to be exercised in this regard and further *that action is required* to ensure that a consistent and coherent approach with the ILO's established standards and supervisory mechanisms is maintained in practice.<sup>171</sup>

The first part of this warning by the Committee echoes the wording of Article I.2. of the Declaration:

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<sup>169</sup> Annex Article II.B.3.

<sup>170</sup> See Valticos & von Potobsky, pp. 284 onwards; Landy, *The Effectiveness of International Supervision*, pp. 19-31.

<sup>171</sup> Report of the Committee of Experts on the Application of Conventions and Recommendations (ILO: Geneva, 1999) para. 59. Emphasis added.

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[The follow-up mechanism] is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning; consequently, specific situations within the purview of those mechanisms shall not be examined or re-examined within the framework of this follow-up.

However their view that 'action is required' suggests that the existence of this provision is enough and that the Committee's fears will be realised under the present arrangements.

So are the Committee of Experts fears well founded? It has been argued above that there is certainly scope for the Group of Experts to assume a supervisory role. Three further issues seem to suggest the worst for the Committee.

The first is striking similarity of both the profile of the each body and the procedure for their respective appointments. Each set of experts is appointed for three years,<sup>172</sup> must be 'impartial' and 'independent',<sup>173</sup> and must ensure a balance of experience with different legal and social systems.<sup>174</sup> Most importantly, the experts of each body are appointed by a resolution of the Governing Body on the proposal of the Director General.<sup>175</sup> This feature will be discussed in more detail below. Further, in considering the Annual Reports of member states, the Group of Experts will be obliged to take into account the comments on the reports made by domestic tripartite groups, a task also borne by the Committee of Experts in considering periodic reports.<sup>176</sup> These similarities are simply being noted to suggest that when operational, the Group of Experts will *appear* very much like the Committee of Experts.<sup>177</sup> Were the Group of Experts to be motivated to *function* in a way similar to the Committee of Experts, then these similarities would assist by making it easier for the Group of Experts to adopt the functional and procedural features of the

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<sup>172</sup> All requirements for members of the Committee of Experts are restated in the Committee's Report to the 73rd Session of the ILC (1987), Report III (Part 4A) para. 18; GB.274/2 para.21.

<sup>173</sup> GB.274/2 para. 16.

<sup>174</sup> GB.274/2 para. 20.

<sup>175</sup> GB.274/205 para. 4, and GB.274/2 para. 19.

<sup>176</sup> Both pursuant to Article 23 ILO Constitution: GB.274/205 para. 3.

<sup>177</sup> This similarity was not lost on the Office or Governing Body. As the job description they had drafted made members of the Committee of Experts the most qualified to join the Group of Experts, it was also decided that 'members of the group [of Experts] ... should not have any

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Committee of Experts. This would not be coincidental as the Annual Reporting system in which the Group of Experts is to function is based on the Article 19 reporting system for unratified conventions, the latter being within the terms of reference of the Committee of Experts.<sup>178</sup>

One difference between the two bodies merely strengthens the case that the Group of Expert will evolve into a supervisory rather than promotional body. There is no limit on the number of members of the Committee of Experts. After an initial period they have generally numbered twenty but at the time of writing there are nineteen.<sup>179</sup> However, on the advice of the Office, the Governing Body has specified that the Group of Experts is to be limited to an *uneven* number of members, initially seven. No reason is given:

As regards the composition of the group of experts, several considerations will have to be taken into account: first, there should be an uneven number of experts.<sup>180</sup>

Presumably this condition is to facilitate a majority decision if a vote is called on any matter. This may appear to be an inconsequential point, however it is difficult to see why a small group whose only task is to write an short introduction to a country's Annual Report which draws attention 'to any aspects which might call for a more in-depth discussion' would need to call a vote on an issue. Perhaps there might be disagreement among the experts as to which aspects should recommend to the Governing Body for more in-depth discussion. But the Governing Body is entitled to discuss anything arising in an Annual Report, whether the Experts draw attention to it or not, hence there is no question of a Group of Experts wielding any power to restrict the information available to the Governing Body. The condition would, however, support the functioning of a body that was to deal with contentious matters, such as the highlighting of areas in an Annual Report in a critical or comparative way.

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other function within the ILO or its various bodies.': GB.274/2 para. 18.

<sup>178</sup> Committee of Experts Report to the 73rd Session of the ILC (1987), Report III (Part 4A) para. 17.

<sup>179</sup> E. Landy, *The Effectiveness of International Supervision*, p. 21.

<sup>180</sup> GB.274/2 para. 20.

1. The first part of the document is a list of names and addresses of the members of the committee. The names are listed in alphabetical order, and the addresses are given in full, including the street, city, and state.

2. The second part of the document is a list of the names and addresses of the members of the committee who have been elected to the office of chairman. The names are listed in alphabetical order, and the addresses are given in full, including the street, city, and state.

3. The third part of the document is a list of the names and addresses of the members of the committee who have been elected to the office of secretary. The names are listed in alphabetical order, and the addresses are given in full, including the street, city, and state.

The second issue that will have a large bearing on the role of the Group of Experts is the involvement of the Director General and Office in the selection procedure. Elsewhere we have mentioned the large (perhaps inordinately so) role the Director General and Office play in shaping policy within the Organisation, and the Declaration appears to be no exception. In relation to the Group of Experts, all of the requirements and procedures referred to above and below which were left to be decided after the adoption of the Declaration have been suggested in the first instance by the Office.<sup>181</sup> Hence, at the March 1999 session of the Governing Body, *every* proposal of the Office regarding the Declaration was adopted by the Governing Body, the only amendment being a minor adjustment to the forms to be used in requesting Annual Reports from states.<sup>182</sup> The functioning of the Declaration's follow up procedure (including the Group of Experts) cannot be said to be immune from the concerns and aspirations of the Office. Similarly, the Director General plays a pivotal role in the selection of the Group of Experts. In an example of an Office control mechanism being inserted after an executive decision has been made by member states, the Declaration allowed for the Group of Experts to be 'appointed ... by the Governing Body'.<sup>183</sup> The Office then successfully proposed that the selection be made by the Governing Body from a shortlist chosen by the Director General.<sup>184</sup> Although it might be said that any other method (for example the calling of nominations from the tripartite constituents) would undermine the impartiality of the Experts, the chosen procedure places a significant – some might say enormous – amount of influence over the composition of the Group of Experts (and thus over the functioning of the follow-up) in the hands of the Director General. Once appointed, the 'independence' of the experts would leave the Director General free of any responsibility for their actions.<sup>185</sup>

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<sup>181</sup> 'As regards all other aspects involved in implementing the follow-up, the Governing Body has requested the Office to submit concrete proposals at its 274th Session.': GB.274/2 para. 2.

<sup>182</sup> GB.274/2 paras 15, 23, 31 and 34; GB.274/205 paras 2-6.

<sup>183</sup> Annex Article II.B.3.

<sup>184</sup> GB.274/205 para. 4.

<sup>185</sup> The domestic analogy of political appointments by the executive to judicial positions seems apposite.

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The third factor is the terms of reference of the Group of Experts. As mentioned above, the Declaration gives the Group a mandate to examine the each Annual Report and draft 'an introduction to the reports thus compiled, drawing attention to any aspects which might call for a more in-depth discussion'. This appears to have been amplified by the Governing Body such that:

The purpose of this introduction is to facilitate the Governing Body's discussions by analysing the replies received, *in particular as regards the assessment of the factual situation and the progress made*, so as to draw attention to any aspects that might call for more in-depth discussion.<sup>186</sup>

It is expected that after the first round of Annual Reporting, states will merely be asked to provide any changes to the their law and practice in respect of the fundamental rights.<sup>187</sup> The reporting forms for the first round of Annual Reports as adopted by the Governing Body are designed to collect reference data from any changes are measured.<sup>188</sup>

It thus appears that the Group of Experts will not be able to fulfil their role without passing some judgement on a state's action or inaction over the previous twelve months. One finds it difficult to imagine how else their 'introduction' could be drafted, nor can one imagine that the points to which they will drawn the Governing Body's attention will be the routine or non-contentious issues.<sup>189</sup> The Office seems to think the investigation will go even further. A senior Office member has described the role of the Declaration in the following terms:

[The Declaration] should stimulate more countries to ratify ILO's basic standards, by subjecting their motives to *sustained scrutiny* until they do, while allowing *in-depth examination of situations arising* when they have not ratified.<sup>190</sup>

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<sup>186</sup> GB.274/2 para. 24. Italics added.

<sup>187</sup> GB.274/2 para. 11.

<sup>188</sup> See GB.274/2 (Add.1).

<sup>189</sup> One might foresee the Experts 'congratulating' or 'encouraging' a member state on positive changes since their last reports, but it seems unlikely that these would need to be referred to the Governing Body for more 'in-depth' praise.

<sup>190</sup> Swepston, *ILM*. Emphasis added.

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The independence of the Group from the Office and the tripartite constituents should only encourage them to adopt a critical perspective on the Annual Reports.

### iii. Discussion of the Reports

Finally, in considering the promotionality of the follow-up procedure, there is the question of the fora in which both the Annual and Global Reports are to be discussed: the Governing Body for the Annual Report and the Conference for the Global Report. Governments may expect that in both these fora - half of members of which are representatives of fellow member states - a report on their compliance with the fundamental principles will not be the subject of criticism or comparison. Solidarity between member states might suggest at least this. However the scope for the embarrassment of having a negative report merely discussed in these fora could be sufficient to put governments on the defensive.

The terms of reference laid down by the Declaration for discussion of both the Annual and Global Reports are scant. Annual Reports 'will be reviewed by the Governing Body'.<sup>191</sup> Global Reports 'will be submitted to the Conference for tripartite discussion as a report of the Director-General', after which it is for the Governing Body 'to draw conclusions from this discussion concerning the priorities and plans of action for technical co-operation to be implemented for the following four-year period'.<sup>192</sup> These mandates are to be read in light of the general injunction that:

this follow-up will allow the identification of areas in which the assistance of the Organization through its technical co-operation activities may prove useful to its Members to help them implement these fundamental principles and rights.<sup>193</sup>

If we first focus on the Annual Reports, a deeper examination of the Declaration and events since its adoption alter this plan of a non-combative discussion in the Governing Body in which member states' Annual Reports are merely used to define areas ripe for

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<sup>191</sup> Article 2.B.2.

<sup>192</sup> Article 3.B.2

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technical assistance. First, the Declaration allows for the standing orders of the Governing Body (where not all governments are represented) to be amended to allow member states whose reports are being discussed 'to provide, in the most appropriate way, clarifications which might prove necessary or useful during Governing Body discussions to supplement the information contained in their reports'. A right of reply to both the Group of Experts' 'introduction' and any matters that arise during the Governing Body discussion is thus established.<sup>194</sup> Once the discussion of an Annual Report allows the member state concerned to reply to assertions of both the Group of Experts and members of the Governing Body, it is difficult to imagine a procedural mechanism that would prevent an adversarial debate developing.<sup>195</sup> Being only too aware of this evolution into an quasi-adversarial procedure, the Office and Governing Body have attempted to impose such a mechanism. In proposing the changes to the Standing Orders to give effect to this right of reply, the Office noted that:

Under the Constitution and Standing Orders currently in force, the participation of States that are not members of the Governing Body is strictly limited to adversarial procedures. In order to accommodate the promotional participation called for by the Conference as part of follow-up [sic] on the Declaration, and so as not to create any precedent and to avoid any confusion with the adversarial procedures, the Office has prepared a solution that involves enabling the Governing Body to suspend its official sittings and to meet as a committee of the whole.

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The Governing Body may decide to meet as a committee of the whole in order to hold an informal exchange of views, in which it may decide to give, according to modalities to be determined by it, an opportunity to representatives whose governments are not represented on the Governing Body to take the floor or to submit a communication in writing.<sup>196</sup>

Whether or not this manoeuvre on the part of the Governing Body will be successful will

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<sup>193</sup> Article I.2.

<sup>194</sup> GB.274/2 para. 25.

<sup>195</sup> It should also be noted that the member state's representatives will also be replying for the first time to the comments on its Annual Report by both domestic worker and employer groups.

<sup>196</sup> GB.274/2 paras 26 and 29.

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only become clear with practice.<sup>197</sup> The point for present purposes is to illustrate the difficulty in integrating the notion of promotionality into ILO's supervisory system, and, consequently, how swiftly the promotional aims of the Declaration might degenerate (or perhaps regenerate) into a new supervisory procedure.

If we turn to the Global Report, the scope for a critical discussion of the individual member states behaviour is less likely owing to the fact that the position in all member states is discussed within a single report. The Declaration calls for the Global Report to be 'submitted to the Conference for tripartite discussion as a report of the Director-General'.<sup>198</sup> The Governing Body has decided that the discussion will take place in a separate session of the ILC plenary rather than in a committee of restricted membership as was originally proposed.<sup>199</sup> Although criticism of individual states is rare within the Conference, it is not unknown. In one way, the location of the discussion of Global Reports in the conference plenary may actually facilitate a debate with individual member states as, 'since all member states (with a few minor exceptions) send delegations to the Conference, it is difficult for them to refuse to provide a representative to respond to questions'.<sup>200</sup> The results of the Conference discussion of the Global Report will themselves be subject to further discussion in the subsequent Governing Body session.<sup>201</sup>

The purpose of suggesting these ways in which the promotional character of the Declaration could be undermined is to show that the Declaration has the capacity to go beyond the intention of its proponents and grow in importance in the ILO rather than ultimately wane. Its potential to be used as a 'stick' against member states who do not put into practice the rhetoric of fundamental rights, and its potential to be used as a basis

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<sup>197</sup> As with all arrangements for the implementation of the follow-up mechanism, this decision of the Governing Body will be subject to review by the Conference. Article IV. 2 of the Declaration provides that:

The Conference shall, in due course, review the operation of this follow-up in the light of the experience acquired to assess whether it has adequately fulfilled the overall purpose articulated in Part I.

<sup>198</sup> Annex Article III.B.2.

<sup>199</sup> GB.274/2 para. 38.

<sup>200</sup> V. Leary, 'Lessons from the experience of the International Labour Organisation', p. 601.

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from which to claim new fundamental rights, are clearly seems at odds with its promotional nature. The issues discussed above suggest that the three and a half page Declaration and follow-up will have a greater impact on both the ILO and its constituents than its drafters and promoters intended.

*4. What does the adoption of the Declaration mean for the ILO system of international labour standards?*

Much has been postulated above about the possible effects of the Declaration once it is operational. In particular, the analysis has focused on the supposed 'promotional' nature of the instrument and suggested ways in which this could be undermined. As such it is largely conjecture, albeit deduced in light of past experiences of the ILO, such as the powerful role of the Office and the Director General. Little will be clear until the provisions of the Declaration and its follow-up are operational, and even later, after these provisions have been interpreted by a period of practice. With this caveat, we turn to look at the possible effects of the Declaration on the ILO's system of international labour standards. At the outset of this thesis it was suggested that the challenges faced by this system demanded either reform of the system itself, or a movement 'beyond standards'. The issue now is whether the Declaration can be seen as a modification of the standards system in order to address some of the system's more glaring inadequacies in dealing with the effects of trade liberalisation, or whether its manifold novelties take it outside the standards system entirely.

It would be disingenuous to argue that the Declaration is not an international labour standard of some sort. It clearly promotes the observance of (and arguably creates) norms applying across different jurisdictions. Our comparison, however, is with the *ILO system* of international labour standards, and all of the features that entails as outlined in Part II above. On this basis, it is relevant to note that the Declaration was negotiated on a

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<sup>201</sup> GB.274/2 paras 40-46.

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consensus basis, it involved all tripartite constituents, and it benefits from a high level of technical assistance from the Office. But even with these features the Declaration does not sit happily within the international labour code. The novelty of declarations within the ILO system, the problems with confused definition of fundamental rights, the lack of a clear link with the core conventions and the insistence on promotionality, all set the Declaration apart. Its advent has required the drafting of special procedures and amendments to standards and supervision procedures that have hitherto remained intact for over seventy years. One might say that the same could have been said of the Committee on Freedom of Association procedure when it was introduced in the 1950s. That development, however, promoted the features of the ILO model: it was clearly based in a convention, it established a complaints base procedure, and comprises both political (the tripartite Committee on Freedom of Association) and technical (the independent Fact-finding and Conciliation Commission) aspects.

The Declaration on the other hand establishes a follow-up mechanism that displays few of the features outlined in Part II. Promotion rather than compliance is to be monitored, the balance of technical and political is skewed in favour of the political as the role of the Group of Experts is (on its face) marginal. The instrument is mandatory in nature, in the sense that it is not based on member states freely accepting obligations, at least insofar as the follow-up is concerned. We have seen above that the 'standards' being set are far from precise and the way in which member states are to give effect to them is unclear in the extreme. Notions of flexibility pervades both the fundamental rights and the way in which states are obliged to enforce them. The follow-up expressly excludes the possibility of a complaints-based system.

The formal view of the ILO on the relationship between the Declaration and the international labour standards is somewhat confused. On the one hand, it has been emphasised that the Declaration is part of a programme designed to strengthen the labour standards system insofar as its goal is to promote universal ratification of the fundamental

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conventions.<sup>202</sup> In this light, the Declaration might be seen to be akin to technical co-operation, which also has as an aim assisting ratification of ILO conventions. But the Declaration itself and the debates surrounding its adoption are often at pains to emphasise that the two processes need to be distinguished: one being the ILO's competence 'to set and deal with international labour standards', the other being the 'organisation's role in promoting fundamental rights at work as the expression of its constitutional principles'.<sup>203</sup>

It is submitted that the Declaration cannot properly be considered a part of the standards system as developed by the ILO over the past 80 years. It is grounded in constitutional procedures and its links with ILO conventions and supervisory procedures are purposefully unclear. Its role, rather than being to enforce rights, is to promote. In this sense, it is *sui generis*. It will, as we have seen, necessarily impact on the standards system. Ostensibly, this impact is to be beneficial, as the stated goal of the Declaration is to promotes rights that 'have been expressed and developed in the form of specific rights and obligations in Conventions'.<sup>204</sup> Our examination in the previous sections, however, would suggest that ultimately, the effect of the Declaration on the international labour code will be undermining. While much depends on the way the Declaration is applied in practice (and the earlier discussion argues that there is scope for a robust rights based supervisory procedure to develop rather than the promotional scheme envisaged), the Declaration appears to constitute a new approach to the international regulation of labour. The features of this new approach appear to be:

1. a division of labour rights into immutable or 'fundamental' rights on the one hand and other, 'relative' rights on the other;

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<sup>202</sup> Office Background Paper, p. 4.

<sup>203</sup> Declaration preambular paragraph 6. Note that the original draft of this paragraph saw the promotion role as deriving from (and therefore being part of) the ILO's standard setting mandate: Whereas the ILO, under its exclusive mandate to establish and implement international labour standards, is universally acknowledged as the competent organization to promote these fundamental rights as the expression of its constitutional principles and values (Office Background Paper, Annex).

This wording was subsequently changed.

<sup>204</sup> Article 1.b.

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2. an approach to implementation that downplays enforcement and emphasises technical assistance;
3. a less prominent role for independent experts; and
4. the maintenance of the strong influence of the Office over the implementation process.

If this observation is true, then the Declaration will in the future not be *sui generis*, but will be the first instrument of a new approach to labour regulation which is beyond standards. We now turn to look at the second option being proposed to the ILO.

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#### IV. CODES OF CONDUCT

If the Declaration can be seen as a response generated by the ILO to external pressure to 'do something' about the social effects of trade liberalisation, then the experience with private sector initiatives is quite the opposite. Again, we have the ILO doing very little in the area. But the other actors (multi-national enterprises (MNEs), employer groups and other NGOs and even some governments) are doing much, and at first glance are seemingly happy to have the ILO uninvolved if not excluded. Yet the exponential growth in the 1990s of private initiatives in the field of labour rights in some ways mirrors the rising challenges of trade liberalisation facing the ILO and its labour standards system. For many, these private initiatives have begun to fill the void left by the increasing ineffectiveness and even irrelevance of the ILO's conventions. Although the true picture is far more complex, private initiatives can be seen to present an alternative to the international labour code and, more acutely, its supervisory mechanisms. This is a response to trade liberalisation that has been forced on the ILO and for the reasons outlined below, it is an alternative that the Organization can scarcely afford to ignore for much longer.

##### *1. Codes of conduct as private sector initiatives*

Without definition, the term 'private sector initiatives' seems hopelessly wide. Even with the definition set out below, one might think that a more focused tag could be found to describe the various activities that fall within its sphere. The term however is used here for two reasons. First, the activities it denotes are recent in conception and expanding in scope. Thus, while they may have appeared two or three years ago to concern themselves solely with corporate social responsibility, the advent of NGO, investor and even government involvement has taken them beyond the scope of a 'corporate initiatives' tag. Likewise, the increasing *mélange* of social and environmental issues within the initiatives would belie any purely social view of the phenomenon as a whole. The second reason



behind the use of term here is that it is the phrase used within the ILO to describe these activities.<sup>205</sup>

Private sector initiatives are defined by their non-governmental or private sector character.<sup>206</sup> Although governments are now seeking to influence these initiatives, that influence is (and, it is submitted, will remain for the foreseeable future) restricted to an advisory and not regulatory role.<sup>207</sup> Indeed it is the voluntary nature of the initiatives that underlines the core reason for their emergence: the increasing inability of governments to fill the regulatory role in the area of labour issues in the era of trade liberalisation.<sup>208</sup> The three major private sector initiatives around today are codes of conduct, social labelling programmes and investor initiatives.<sup>209</sup> We will limit our discussion to codes of conduct, but all three types of initiative share similar advantages and constraints.

Codes of conduct are written statements that are intended to regulate an enterprise's

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<sup>205</sup> *Overview of the global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues*, GB.273/WP/SDL/1(Rev.1), p.1.

<sup>206</sup> *Ibid*, p. 1.

<sup>207</sup> See, for example, the Canadian Government's *Voluntary Codes Guide* (<http://strategis.ic.gc.ca/SSG/ca00880e.html>); the Australian Government's *Fair trading - codes of conduct : why have them, how to prepare them* (Canberra : Australian Government Publishing Service, 1996), the New Zealand Government's *Guidelines on Developing a Code of Practice* (Wellington, N.Z. : Ministry of Consumer Affairs, 1993) and the United States Government's *Model Business Principles*, part of its Best Global Business Practices Program (see <http://www.ita.doc.gov/bgp/model.html>).

<sup>208</sup> This is not to deny the existence of private sector initiatives run as voluntary partnerships between the private sector and governments. However a government's role in such a partnership is limited to (generally technical) advice.

<sup>209</sup> The term 'social labelling' has come to connote a means of communicating information through a physical label about the social conditions surrounding the production of a product or rendering of a service (GB.273/WP/SDL/1(Rev.1), para. 68). Investor initiatives broadly take three forms. Under the first, *investment fund screening*, investment portfolios invest or divest in publicly trade corporate securities depending on the social performance of the company. *Shareholder initiatives* on the other hand, include activities based on share ownership such as exercising voting rights, submitting shareholder resolutions, asking questions at corporate annual meetings and even informal negotiations between shareholders and management. The third form is known as *community investing*. Different in character from those outlined above, this approach sees investment programmes focused on community development initiatives (see <http://www.socialinvest.org/InvSRItrends.htm>).

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conduct and often that of other actors. Other than labour issues, codes of conduct exist that deal with environmental matters, corruption and even interference in the domestic political process. We are here concerned with codes of conduct that regulate corporate behaviour in labour issues at the international level: that is, codes that cover workers employed directly by an enterprise in a foreign jurisdiction, or (more commonly) codes that cover workers employed by foreign suppliers and which thus attempt to regulate behaviour, practices and standards of participants in supply chains.<sup>210</sup>

The motivations behind the adoption of a code of conduct by a corporation are essentially commercial. The need to preserve or legitimise a reputable public image has become not merely a tool in increasing the market share of an enterprise's product, but also an form of insurance against the rising number of consumer boycotts following *exposés* of conditions in which workers produce goods for a well-known brand name. An example at the time of writing of the dangers of not only failing to adopt a code but also of not enforcing a code once adopted, is that of a clothing brand Kathy Lee Gifford. The brand, which is sponsored by the US television personality of the same name, is retailed by WalMart Inc. (the world's largest retailer), where it sold over \$300 million worth of stock in its first year. In April 1996 a US-based NGO exposed the conditions of workers making garments for the line in a Honduras clothing factory: extensive use of child labour, wages of 31 cents per hour, seventy hour working weeks with no overtime, widespread sexual harassment of female employees, and high manual labour work for pregnant employees in an effort to have them resign.<sup>211</sup> This was despite a detailed code of conduct imposed by WalMart of Honduran suppliers that forbade, *inter alia*, the use of child labour. The subsequent scandal resulted in a public pledge by Ms Gifford 'to not tolerate sweatshop conditions', the relocation by WalMart of production and the setting

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<sup>210</sup> The discussion will not cover the two multilateral instruments regulating MNE conduct: the OECD Declaration on International Investment and Multinational Enterprises of 1976 and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977. For a detailed discussion and comparison of these instruments see *Legal Problems of Codes of Conduct for Multinational Enterprises* (ed. N. Horn) (Deventer: Kluwer, 1980) pp. 127 – 176.

<sup>211</sup> 'Kathy Lee and the Sweatshop Crusade', *Los Angeles Times*, 14 June 1996.



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up by Ms Gifford of her own 'labour conditions inspection team'.<sup>212</sup> However in September 1999 new allegations surfaced of abusive labour practices in El Salvadoran factories producing Ms Gifford's line.<sup>213</sup> The sight of two of the factory's worker in Washington before the media has generated a large amount of publicity and prompted a new consumer boycott. WalMart is again considering the costly exercise of moving production.

Codes thus fulfil a warranty role: both from the supplier to the retailer and from the retailer to the consumer that goods are produced in acceptable conditions. A properly implemented code will cost money, both for the supplier in adhering to it and for the retailer in establishing and maintaining verification regimes. While for the supplier this could mean jobs losses or even insolvency, for the retailer this cost merely increases the need to bring the existence of its codes to the attention of consumers in order to justify higher prices and 'to stop less prominent and less scrupulous competitors benefiting from their new-found virtue'.<sup>214</sup>

Codes of conduct are adopted voluntarily in the sense that there is no legal compulsion to adopt. This is the source of many weaknesses of codes in promoting labour standards. These will be discussed in detail below. A further consequence is that codes are not legally enforceable as labour standards. They can, however, expose enterprises and subcontractors to liability under trade practices, false advertising and antitrust legislation. If the terms of a code are incorporated into a supply contract, then there will be contractual remedies for their breach between the sub-contractor and the enterprise.

The coverage of codes of conduct containing labour provisions varies widely.<sup>215</sup> The best-

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<sup>212</sup> *Ibid.*

<sup>213</sup> 'Kathie Lee Line Faulted on Labor', Associated Press NewsWire 22 September 1999

<sup>214</sup> *The Economist*, 5 December 1998.

<sup>215</sup> On codes of conduct generally see: Tsogas, *Corporate Codes of Conduct and Labour* especially pp. 64-70; J. Murray, 'Corporate Codes of Conduct and Labour Standards' in *Mastering the Challenge of Globalisation: Towards a Trade Union Agenda* (ed. R. Kyloh) (Geneva: ILO, 1998) pp. 45-104; *Legal problems of codes of conduct for multinational*

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known *operational codes*<sup>216</sup> are those adopted either by a *single enterprise* or an *enterprise association*, the latter being the result of a consensus between members of the association. These are to be distinguished from codes adopted by *employers' organisations*. An approach that is increasingly adopted by enterprises or enterprise associations, is to draft a joint code with a *workers' organisation*, an approach which provides the enterprise with clear benefits in terms of credibility and industrial relations, though there is uncertainty as to the effect of such codes on collective bargaining

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*enterprises* (ed. N. Horn) (Deventer: Kluwer, 1980); R. Waldmann *Regulating international business through codes of conduct* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1980); U.S. Department of Labor, Bureau of International Labor Affairs, *The apparel industry and codes of conduct : a solution to the international child labor problem?* (Washington, D.C.: U.S. Department of Labor, 1996); *Joint report on the main issues emerging from the EU-US 1 Symposium on Codes of Conduct and International Labour Standards*, (Washington, D.C.: U.S. Dept. of Labor, 1998); J. Diller, 'A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives' Vol. 138 No. 2 *International labour review* (1999), p. 99; M. Emmelhainz, R. Adams 'The Apparel Industry Response to "Sweatshop" Concerns: A Review and Analysis of Codes of Conduct', Vol. 35 No. 3, *The Journal of Supply Chain Management* (1999), p. 51; R. Liubicic, 'Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives', Vol. 30, No. 1 *Law and policy in international business*, p. 111; R. Toftoy, 'Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?' Vol. 15 No. 3 *Arizona Journal of International and Comparative Law* p. 905; N. Krug, 'Exploiting Child Labor: Corporate Responsibility and the Role of Corporate Codes of Conduct' Vol. 14 No. 3 *New York Law School Journal of Human Rights*, 1998 p. 651; W. van Genugten and S. van Bijsterveld, 'Codes of Conduct for Multinational Enterprises: Useful Instruments or a Shield Against Binding Responsibility?' Vol. 7 No. 2 *Tilburg Foreign Law Review*, 1998, p. 161; K. Hagen, 'Issues Involving Codes of Conduct from an ILO Perspective' Vol. 92 (1998) *Proceedings of the American Society of International Law* p. 267; G. van Liemt, 'Codes of conduct and international subcontracting: a 'private' road towards ensuring minimum labour standards in export industries' in *Global Production and Local Jobs* (eds G. Gereffi, F. Palpacuer and A. Parisotto)(Geneva: ILS, 1999 forthcoming); L. Roberts, 'Codes of Conduct and Implications for Small Enterprises', Vol. 9 No.3 (1998) *Small Enterprise Development*, p. 2; Burns, M. *et al.*, *Open Trading: Options for effective monitoring of corporate codes of conduct* (London: New Economics Foundation and Catholic Institute for International Relations 1997); United States Council for International Business, *Statement of the United States Council for International Business: codes of conduct: old solutions to old problems*, 9 July 1997.

<sup>216</sup> Operational codes are to be distinguished from *model codes* which are issued by enterprise associations, unions, NGOs and now governments to influence the way in which operational codes are drafted and implemented, for example by promoting consistency in language and levels of standards. An important recent development in model codes was a January 1999 resolution of the European Parliament recommending a model code for European businesses operating in developing countries that would be based on core ILO conventions (A-4-0508/98).



procedures.<sup>217</sup> This form of hybrid code is taken a step further with NGO involvement. This has not unsurprisingly seen a level of friction between the worker and NGO actors in the code-drafting process. A successful example is the UK Ethical Trading Initiative which balances the involvement of workers' organisations and NGOs.<sup>218</sup> There has also been an attempt to introduce a code with global coverage. In June 1998 the New York based Council on Economic Priorities launched its SA8000, a standard based on manufacturing quality standards, but covering a company's performance in basic labour rights and monitored externally. The scheme has only met with moderate success.

The ways in which codes of conduct operate in practice vary widely, depending on the scope of the code, its supervision provisions, and above all, the commitment of the enterprise to the successful operation of its code. To illustrate the main common operational features of codes, we will briefly examine the code of conduct operated by Federated Department Stores Inc. (FDS), an American MNE which is the largest operator of department stores in the United States under the trading names *Bloomingdale's*, *The Bon Marche*, *Burdines*, *Macy's*, *Rich's/Lazarus/Goldsmith's*, and *Stern's*. FDS adopted a Vendor/Supplier Code of Conduct in 1996 following the debate over Kathy Lee Gifford suppliers.<sup>219</sup> The FDS Code was sent to each of the company's existing suppliers with a covering letter in which the supplier was asked to sign a form acknowledging that the supplier has 'received the Code, understands and agrees to adhere to its contents and is in compliance'.<sup>220</sup> Suppliers are then informed that 'each vendor of ... merchandise must sign and return this letter as a condition of doing business with [FDS]'. New suppliers are sent the same material, thus ensuring that every FDS supplier is in theory bound by the Code.<sup>221</sup>

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<sup>217</sup> One approach is for the code to be incorporated into the national level collective agreement. An example is the EURATEX/ETUF-TCL agreements: GB.273/WP/SDL/1(Rev.1), para. 40.

<sup>218</sup> Interview with Simon Steyne, International Officer, TUC, Geneva, 18 June 1999. See also <http://www.ethicaltrade.org/about/content.shtml#whoinvolved>.

<sup>219</sup> See generally [http://www.federated-fds.com/report/chapter5/index\\_2\\_5.asp](http://www.federated-fds.com/report/chapter5/index_2_5.asp).

<sup>220</sup> FDS form letter to vendors, on file with the author.

<sup>221</sup> The Code itself goes on to specify that acceptance by suppliers or purchase order and shipping

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The FDS Code itself sets out six substantive labour standards that must be guaranteed: a prohibition on forced labour, prohibition on certain child labour, freedom from harassment and abuse, non-discrimination, a limitation on and payment for overtime worked and right to a rest day each week. Otherwise, suppliers are enjoined to respect the domestic labour laws. A verification procedure is established under which FDS is authorised to use employed and third party monitors to conduct 'pre-production evaluations' and subsequent 'unannounced and unaccompanied inspections'. Technical standards are laid down for measuring compliance in the areas of age and wage verification,<sup>222</sup> health and safety<sup>223</sup> and dormitories. The verification procedure is carried out on a permanent basis and involves a significant level of company resources. In Italy alone, ten employees are engaged on a part-time basis to conduct unannounced supplier inspections.<sup>224</sup> The verification form used by these inspectors runs to 58 sections and over 100 questions, all of which must be answered, including questions that require physical measurements, such as for light intensity and doorway dimensions.<sup>225</sup> The Report must be signed by the inspector, the supplier, the quality control manager, the local FDS office manager and the by the regional executive vice present in either Hong Kong or New York. These reports are then filed as a defence against any claims in the future. Line managers in the company are required to report regularly on the number and result of unannounced site inspection of suppliers.

While it is not suggested that all codes of conduct operate in a manner similar to that of FDS, the above summary of the FDS code structure is intended to illustrate:

1. the seriousness with which codes of conduct are approached in large reputable MNE's. It appears that a similar level of sophistication is maintained in the codes systems of other large apparel retailers in the United States; and<sup>226</sup>

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of goods each constitute a 'continuing affirmation of compliance' with the Code.

<sup>222</sup> Such as production of clear wage slips and file documentation verifying a worker's age.

<sup>223</sup> Such as the number of toilet facilities, the level of lighting, the size of fire exits etc.

<sup>224</sup> Interview with I. Christofferssen, Vice-President (Europe) FDS, 21 May 1999.

<sup>225</sup> FDS Manufacturer Compliance Evaluation Report (or file with the author).

<sup>226</sup> US Department of Labor, *Codes of Conduct in the U.S. Apparel Industry*, Washington: Dept.

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2. the way in which the codes affect the relationship between retailer and supplier and retailer and foreign worker.

The FDS code will also provide an example against which the strengths and weaknesses of codes can be tested in the discussion below.

## 2. *Problems with codes of conduct*

Many commentators see the rise of codes of conduct as a positive development in the enforcement of labour standards.<sup>227</sup> They are seen to be more effective in eliminating poor working conditions because they rely on commercial rather than legal pressure, and they overcome the very real problems of lack of enforcement of domestic labour law in many countries. Some say that because of the unlikelyhood of a link between trade and labour standards, codes of conduct and other 'ethical sourcing' initiatives offer the *only* way forward.<sup>228</sup> On the other hand, they are also seen as embodying a high degree of flexibility which is lacking in international labour standards: flexibility in terms of being able to tailor labour standards to the commercial, geographical, political and social circumstances of the employing supplier. Flexibility also in terms of stipulating a small set of core standards which are non-negotiable, but not regulating every aspect of the employment relationship. Codes are also seen as prime means of engendering corporate social responsibility (forming, together with environmental and financial obligations, the much vaunted 'triple bottom line')<sup>229</sup> and as a means of somehow compensating for the

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of Labor, 1996:

(<http://www.dol.gov/dol/ilab/public/media/reports/apparel/main.htm>).

<sup>227</sup> See Tsogas, *Corporate Codes of Conduct and Labour*; U.S. Department of Labor, *The apparel industry and codes of conduct*; van Liemt, 'Codes of conduct and international subcontracting'; and Burns, M. *et al.*, *Open Trading*.

<sup>228</sup> Tsogas, p. 60. Tsogas makes the case for codes generally (see pp. 1-15).

<sup>229</sup> A recent development in corporation governance, the bottom line in measuring an enterprise's measure is seen to have expanded from the solely financial to include environmental and social indicators. See J. Elkington *Cannibals with Forks: the Triple Bottom Line of 21st Century Business*, (Oxford: Capstone, 1997) and C. Desgan, 'Implementing Triple Bottom Line Performance and Reporting Mechanisms', Vol. 70 No. 4 *Charter* (1999) p. 40. The triple bottom

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shrinking of the public sector which has followed trade liberalisation.<sup>230</sup>

However, these perceived benefits<sup>231</sup> are increasingly challenged by a large number of disadvantages in the codes system which have detailed in recent literature. As voluntary private initiatives, codes are not subject to any state regulation, one of the consequences being that their content varies widely. Codes are thus selective in the areas they regulate, the standards they set, the industries they cover and even the workers covered within one industry. They overwhelmingly focus on export industries and within that field, on a small number of sectors: textiles, clothing, leather and footwear, food and beverage, and the chemical and toy industries.<sup>232</sup> These target industries are distinguished by their high consumer profile and susceptibility to consumer pressure. Workers in industries without these features are unlikely to benefit from a code of conduct. On the other hand, where a code is adopted it often discriminates against producers in developing countries who are less able to comply higher standards. This discrimination can be translated into job losses as subcontractors in the South attempt to comply with a code. Subcontractors producing items for more than one retailer may also find themselves subject to more than one code, and perhaps two sets of work conditions.<sup>233</sup>

This selectivity also applies to the substantive rights codes seek to guarantee. Although less so than in respect of social labelling, codes are often single or dual issue instruments, concentrating emotive issues likely to interest consumers, such as child labour and the physical safety of workers. The FDS Code covers a mere six substantive labour standards. Even if we focus on only the four fundamental rights covered in the ILO Declaration, the

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line concept has received criticism for its potential to compromise three disparate forms of value on one balance sheet: N. Mayhew, 'Trouble with the triple bottom line', *Financial Times*, 10 August 1998 referred to in GB.273/WP/SDL/1(Rev.1), footnote 2.

<sup>230</sup> Hence, Robert Reich, the former U.S. Secretary of Labor, complained that the US Labor Department had only 800 wage and hour inspectors to cover 6 million work sites, and in the garment industry alone, there are 22,000 registered contractors. Private inspectors enforcing codes of conduct, he felt, could help in bridging the gap: *Los Angeles Times* June 14, 1996.

<sup>231</sup> There is little reliable empirical evidence to be used in evaluating the effects of codes: GB.273/WP/SDL/1(Rev.1) para. 35.

<sup>232</sup> GB.273/WP/SDL/1(Rev.1), para. 32.

<sup>233</sup> Burns, *Open Trading*, p. 31.

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FDS code omits freedom of association and the right to collectively bargain. This appears indicative of codes at large. In a forthcoming survey of 215 codes of conduct to be published by the ILO,<sup>234</sup> health and safety issues appeared in roughly 75 per cent of all codes, the most frequent occurrence. Freedom from discrimination appeared in two thirds, child labour in 45 per cent, and forced labour in 25 per cent. Freedom of association and the right to collective bargaining appeared in only 15 per cent of codes surveyed.

Further, the content of rights in codes appears to be largely self-defined, with the use of ILO conventions the exception rather than the rule:

Among the codes reviewed ... self-definition appeared to be the leading method of establishing labour practice goals, particularly among enterprise-drafted codes. [D]efinitions varied widely in similarity or divergence from international labour standards on the given issues. Self-defined standards appeared most frequently, ... to set goals implicating level of wages, health and safety, and certain fundamental labour rights. Code provisions which only used portions of ILO instruments in many cases changed the meaning or intended protection of the instrument and qualified as self-definitions.<sup>235</sup>

Codes also suffer from their unilateral nature. There is generally no input from the workers they seek to protect in their drafting and no negotiation with the employers they seek to bind. Indeed despite being largely publicised to consumers by the enterprise concerned, many workers are entirely unaware of the existence of a code of conduct regulating their employer and their work.<sup>236</sup> The notion of for whose benefit codes of conduct are adopted can become unclear, even perverse:

It is time that consumers are protected from buying flowers from multinational companies that deny basic rights to their workers.<sup>237</sup>

On the other hand, where a workers organisation is involved different issues arise. The

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<sup>234</sup> M. Urminsky, *Corporate social responsibility and initiatives relating to the conditions of work* (Geneva: ILO, forthcoming 1999).

<sup>235</sup> GB.273/WP/SDL/1(Rev.1), para. 50.

<sup>236</sup> US Department of Labor, *Codes of Conduct*, p. 86.

<sup>237</sup> British TUC General Secretary John Monks arguing for an industry code of conduct in respect

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uncertain effect on collective bargaining procedures of a union's negotiating a code of conduct has already been mentioned. Further, because the code is in these instances being negotiated with a foreign enterprise, there is scope for a compromise on the level of labour standards applicable. Hence, a code may offer lower protection than even domestic labour laws. This is exacerbated by the unequal access to information among the bargaining parties.<sup>238</sup>

Most documented failures of codes, however, concern their implementation.<sup>239</sup> It is easy for enterprises to adopt a robust code, then ignore implementation. Even MNEs ostensibly serious about implementing their codes admit that takes 'at least five to 10 years to complete voluntary systems'.<sup>240</sup> If an implementation scheme exists, it is in the first instance internal, as in the case of the FDS code. Often linked to an internal quality assurance programme or other corporate governance mechanism, internal implementation schemes suffer from inadequately trained staff and non-standardised verification criteria.

We saw above that the FDS Code includes a highly detailed reporting questionnaire which attempts to standardise verification indicators. FDS inspectors are trained in verification techniques and standards with a training video which would seem to promote standardisation across all regions in which the company buys merchandise.<sup>241</sup> While some enterprise associations have attempted to standardise verification criteria across different codes, the exercise is hampered by the varying rights and standards contained in codes themselves.<sup>242</sup>

Largely motivated by the high cost of verification and the desire to appear non-self-regulating, some larger MNE's have adopted external implementation measures to

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of flower workers: *Financial Times*, 9 May 1997.

<sup>238</sup> See GB.273/WP/SDL/1(Rev.1), para. 59.

<sup>239</sup> For a good description of implementation problems see: S. Zadek, P. Pruzan and R. Evans, *Building corporate accountability: Emerging practices in social and ethical accounting, auditing and reporting* (London: Earthscan, 1997).

<sup>240</sup> 'Retailers accused of delay', *Financial Times* 16 March 1999.

<sup>241</sup> Interview with I. Christoffersen, Vice-President (Europe) FDS, 21 May 1999.

<sup>242</sup> The lack of standardisation also means lack of comparable data to measure progress in the field.



supplement or replace internal systems. This has led to the growth of the social auditing industry, some of which is industry-based (relying on enterprise associations) and some NGO-based. But more and more the external social auditor is a professional inspection or auditing firm, the latter offering social and environmental auditing as adjunct services to their existing financial audit clients.<sup>243</sup> Similar problems of unqualified staff and non-standardised indicators exist with external mechanisms, though these seem to be diminishing in comparison to internal monitoring mechanisms as industry-wide expertise is focused on a small number of external monitoring organisations. In the case of accounting firms, however, conflict of interest concerns arise where established financial audit clients are also social audit clients. One might say that any possible conflict is no greater than that of a firm that gives clients accounting and tax advice, and is also engaged to perform a financial audit. However, financial audits are a statutory requirement, and penalties for fraudulent auditing are severe. No such public duties or penalties arise in respect of social auditing, save perhaps in relation to trade practices legislation.

### 3. *Codes of Conduct and the ILO*

The foregoing discussion briefly outlined the nature of and problems associated with codes of conduct adopted by MNE's as a means of regulating labour conditions in foreign countries. Our interest in codes arises from their relationship to the ILO's system of international labour standards. Their significance derives not only from the exponential

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<sup>243</sup> Hence the accounting firm KPMG offers a 'Sustainability Advisory Service' which offers companies: '(a) reputational risk assessment will assist corporations with identification, assessment and management of critical social, environmental and ethical risks; (b) business process improvement will assist clients with improving in economic, social and environmental performance through the development of appropriate business information systems and more open relationships with stakeholders. (c) supply chain management will assist corporations to manage social and environmental exposure within their supply chains; and (d) social and environmental reporting will assist companies to progress to a position where they can produce auditable social and environmental reports that reflect corporate values.' (see: <http://www.kpmg.net/library/98/december/story2b.asp>).

The growth of this business appears to be exponential. According to PriceWaterhouseCoopers, another large accounting firm, from a position in 1997 where 'ethical audits' were 'rare', the firm conducted 1,500 in the twelve months to January 1999 in one Chinese province alone: 'Sweatshop Wars', *The Economist*, 27 February 1999.



growth in the adoption of codes of conduct in the last 10 years,<sup>244</sup> but also from their visibility generated by 'sweatshop scandals' such as that as befell Ms Gifford. These *exposés* have resulted in consumer action (even boycotts) and eventual promises by enterprises to be vigilant against the use of abusive labour practices by their suppliers, expressed in the form of codes of conduct. Such an evolution in the cases high profile enterprises such as Nike,<sup>245</sup> Reebok,<sup>246</sup> Phillips-Van Heusen<sup>247</sup> and Gap,<sup>248</sup> has meant that private initiatives in the area of labour standards are now arguably better known to the layperson than is the ILO standards system. Private initiatives in general and codes of conduct in particular became a phenomenon that the ILO could not ignore:

[P]rivate initiatives aimed at promoting certain principles and social objectives have become a universal reality with a variety of forms, and constitute an important element in the international debate on the social dimensions of economic development. ... Even if, for the reasons set out in the previous sections, one may question the viability or sustainability of some of these initiatives, it is reasonable to think that this phenomenon will continue to develop whatever the ILO's position on the matter. Under pressure from the public and from consumers, taken up and maintained by an increasing number of NGOs and by the development of a world network facilitating distribution of information, enterprises will undoubtedly react with increasing numbers and more rapidly by making commitments of various kinds and at various levels to offset risks or benefit from advantages that a good social or environmental image can have in commercial terms.<sup>249</sup>

But until recently the ILO had largely ignored the rise of what can be seen as a parallel,

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<sup>244</sup> There are few statistics on the rate of growth of codes, most of the literature merely referring to 'rapid proliferation' (Diller), 'resurgence' (Murray) or 'a proliferation' (US Dept of Labor). An indication of the recent growth of codes can be gleaned from assertions that the Levi Strauss Inc code adopted in 1991 was the first ethical sourcing code developed (US Department of Labor, *Codes of Conduct*, p. 8, and van Liemt, *Codes of Conduct and International Subcontracting*, part 4.1). By 1996 36 of the 42 largest retail MNEs in the United States (based on gross sales) had either a codes of conduct or some other written document obliging foreign suppliers to guarantee at least the use of non-child labour (*Ibid.*, p. iv). Other surveys in the area appear less reliable both in terms of the type of enterprises surveyed and the response rate. See for example The Conference Board, *Corporate Ethics Practices*, 1992 and KPMG, 1997 Business Ethics Survey Report. (<http://www.kpmg.ca/ethics/home.htm>)

<sup>245</sup> <http://www.nikebiz.com/labor/labor.shtml>

<sup>246</sup> [http://www.reebok.com/annual\\_report/hmn\\_intro.html](http://www.reebok.com/annual_report/hmn_intro.html)

<sup>247</sup> [http://www.pvh.com/corp/s\\_workersrights.html](http://www.pvh.com/corp/s_workersrights.html).

<sup>248</sup> [http://www.gapinc.com/community/sourcing/vendor\\_conduct.htm](http://www.gapinc.com/community/sourcing/vendor_conduct.htm)

<sup>249</sup> GB.273/WP/SDL/1(Rev.1) paras 110-111.

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private system of international labour standards. As an organisation, the issue was first addressed by the Director General in his Report to the 1994 ILC, albeit in couched terms:

... the ILO must tackle the issue [of non-governmental actors in standard setting] by supplementing its normative and para-normative work with the other means at its disposal – means which could enable it to mobilize and directly involve the non-governmental actors.<sup>250</sup>

We have already discussed the rejection at the same ILC by the tripartite constituents of the Director General's proposal for a global social label. Similar opposition has kept the issue of codes of conduct away from the agenda of the Governing Body. It was also assumed that as the ILO had no mandate to address enterprises,<sup>251</sup> little could be done.<sup>252</sup> The Organisation thus had no policy on private initiatives. Naturally, an increasing number of enterprises, NGOs, and governments were requesting ILO advice on the use of codes. Without a policy orientation, the Office was merely able to provide information on ILO standards and their possible relevance the request whilst making it clear the ILO did not endorse any private initiatives.<sup>253</sup> This policy gap largely restricted Office activities in the area of private initiatives to research.<sup>254</sup>

A comprehensive study of 'global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues' was

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<sup>250</sup> *Defending Values*, p. 66.

<sup>251</sup> In the absence of an instrument such as the ILO Tripartite Declaration of 1977.

<sup>252</sup> See Report of WP/SDL to the 274<sup>th</sup> Session of the Governing Body (oral report by the Chairperson available at <http://www.ilo.org/public/english/20gb/docs/gb274/gb-15.htm>).

<sup>253</sup> GB.273/WP/SDL/1(Rev.1), para. 133.

<sup>254</sup> See GB.273/WP/SDL/1(Rev.1), paras 94-109. The principal Office activities in the area of private initiatives were: ENTREPRISE published a discussion paper on *Social initiatives by enterprises*; ACT/EMP convened a 'Meeting on Corporate Citizenship and Social Initiatives' in October 1998; ACTRAV included implementation of codes of conduct in its programme to promote more effective responses by workers' organizations at local, national and international levels; TRAVAIL published a preliminary study entitled *Labelling Child Labour Products* in June 1997; and SECTOR convened a number of tripartite meeting on voluntary initiatives in the chemical industry (see *Report for the Tripartite Meeting on Voluntary Initiatives Affecting Training and Education on Safety, Health and Environment in the Chemical Industries*). The most substantive work has been undertaken in the context of the International Programme on the Elimination of Child Labour (IPEC). An IPEC project in the Bangladesh has developed and implemented a third-party monitoring and verification system against child labour in the garment

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commissioned by WP/SDL in late 1997<sup>255</sup> and a follow-up in late 1998.<sup>256</sup> The Report put forward three options for ILO activity in the area. The first, the 'minimalist position', described the *status quo*. A more ambitious option saw the Organisation offering advice (perhaps through the publishing of manuals and guides) to enterprises in drafting codes so as to ensure 'their compatibility with the ILO's objectives and their viability'. Advice and training could also be offered to enterprises faced with operating in an ethical sourcing environment, including training of inspectors.<sup>257</sup> The third option, 'a proactive position of engagement', envisaged the drafting of a code of good practice in drafting and implementing codes of conduct, that was addressed to enterprises using either an amendment to the ILO Tripartite Declaration of 1977 or a new tripartite instrument.<sup>258</sup> There was, however, clearly no consensus among the tripartite groups that would allow this third option to be chosen.

With this detailed Office report and a follow-up before it, the WP/SDL (as a working party of the Governing Body) was asked 'to express its views on appropriate ILO action in this field in order to guide the Director-General in the preparation of future proposals'.<sup>259</sup> Its response however, was to take maintain the current minimalist position and ask the Office to undertake more research.<sup>260</sup> The ILO is thus yet to engage private initiatives.

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industry. A similar involvement was being planned in the Pakistan soccer ball industry.

<sup>255</sup> GB.273/WP/SDL/1(Rev.1).

<sup>256</sup> GB.274/WP/SDL/1 (Further examination of questions concerning private initiatives, including codes of conduct).

<sup>257</sup> GB.273/WP/SDL/1(Rev.1) para. 136. This option seemed to be endorsed by the Director General Somavía in his first Report to the ILC: see *Decent Work*, p. 43.

<sup>258</sup> *Ibid.* para. 138.

<sup>259</sup> GB.274/WP/SDL/1 para. 29. This sense that the Organisation is waiting for urgent policy guidance in the area of private initiatives is reinforced by the Director General's *Programme and Budget Proposals for 2000-1* of March 1999 in which he wrote:

At the time of drafting these budget proposals, some key elements of the 2000-01 programme of work of the ILO are still awaiting further discussion in the decision-making organs. Among them [is] ... work supporting private sector initiatives such as corporate codes of conduct. (GB.274/PFA/9/1 para.5).

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#### ***4. Codes of conduct and the ILO system of international labour standards: challenging or complementary?***

Can the ILO safely ignore private initiatives in general and codes of conduct in particular? Are they a short-lived ineffectual fad or do they threaten the ILO's normative role? In the first instance, it appears that codes of conduct, along with other private sector initiatives, will be a feature on the international labour regulation landscape for some time to come. Rather than being seen as a fad, codes are considered even by MNEs as an entrenched 'part of business life'.<sup>261</sup> We now even see 'second generation' codes of conduct such as that adopted recently by the US-based MNE Nike Inc.<sup>262</sup> The hitherto narrow scope of codes is gradually expanding as MNEs combine their various codes on environment, labour and business ethics into single instruments.

Can the rise of codes and other private initiatives be seen as a reaction to an ineffective ILO labour standards system? It is difficult to see a direct link between the perceived weaknesses in the ILO system and private initiatives. Codes arose with a commercial imperative. Their prime targets are consumers rather than foreign workers. A more effective ILO system would not necessarily have meant that codes would not arise. The late 1960s and early 1970s was a period in during which the ILO standards system was perceived as being effective and efficient,<sup>263</sup> yet also a period of high growth in the use of codes of conduct.<sup>264</sup>

However the global trade liberalisation that has been outlined earlier in this thesis as a prime contemporary challenge to the ILO's standards system is also responsible for

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<sup>260</sup> Report of WP/SDL to the 274<sup>th</sup> Session of the Governing Body.

<sup>261</sup> 'Amnesty Questions Ethics of Multinationals', *Financial Times* 22 April 1998.

<sup>262</sup> Nike's New Code of Conduct (<http://www.nikebiz.com/labor/labor.shtml>).

<sup>263</sup> See Landy, Chapter 3.

<sup>264</sup> The period included promotion of codes by governments (Canadian Government's Some Guiding Principles of Good Corporate Behaviour for Subsidiaries in Canada of Foreign Companies (1967), the Code of Behaviour for Japanese Investors Overseas (1973), and the US Foreign Corrupt Practices Act (1977)) and concluded with the OECD and ILO Declarations. (see Murray, pp. 51-52).

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conditions which, as we have seen above, are conducive to the emergence of codes of conduct. Foreign-located production, increased capital mobility and pressure by MNEs on developing countries to maintain cheap labour costs combine with increased technology and information flows to give consumers not only cheap foreign produced brand-name merchandise, but (increasingly) also knowledge of the conditions under which their purchases are manufactured. Hence we see trade liberalisation producing the somewhat perverse result of both increased consumer knowledge of working conditions but a decreased effectiveness of both governments and the ILO to regulate these conditions. Consumer pressure for change then focuses not on governments but those actors who are perceived to have the power to make change across borders, MNEs. The ILO system is thus largely bypassed.

If the rise of codes and the problems of the ILO system of international labour standards are then seen as two facets of one phenomenon (rather than there being a causal link between the two), can the two systems co-exist ? Codes may support the ILO system, damage it or not effect it at all. Insofar as codes encourage or even cajole employers to respect certain ILO standards (such as the principle of non-discrimination), they can be seen as supporting the ILO system of labour standards. This simple observation however belies the complexity of the relationship between codes and ILO standards. It must first be accepted that the scope of codes is extremely limited in many respects. They only cover a select group of workers (those of a supplier), in a few select high profile industries. They apply overwhelmingly to suppliers in developing countries, the assumption seeming to be that developed country workers can rely on domestic labour standards. Their scope is also limited in terms of rights. As we have seen, codes seek to regulate a handful of rights, and only in a very few cases are all fundamental labour rights as defined in the ILO Declaration included. Some of the rights themselves are even limited in scope, with a variety of definitional sources being used.<sup>265</sup> In this respect codes and private initiatives generally will not be able to compete against the breadth and depth

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<sup>265</sup> ILO Conventions are but one source. Definitions of standards are drawn also from national and, worse, are self-defined: GB.273/WP/SDL/1(Rev.1), paras 50-52.

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of the international labour code. How, for instance, would a private initiative deal with ILO Convention No. 122 on domestic employment policy?

But in the limited areas of their scope, there is a real possibility that codes could damage the ILO system. As the Office report of private initiatives noted, 'such initiatives and the attainment of the ILO's objectives will not automatically converge'.<sup>266</sup> Let us consider the position of a worker in a factory in a developing country. If that country has not ratified core ILO conventions, the worker's situation is undeniably ameliorated by a code of conduct governing her work. If, however, the country has ratified all core conventions, then it is in her employer's interest to adhere to the terms of the code rather than the core conventions (as embodied in domestic law) – terms that will almost certainly be less generous to the worker than those of the convention. The reason for this is that by complying with the convention, the employer incurs the obligation to respect a relatively high level of labour conditions, but neither gains nor loses relative to other employers in the same jurisdiction, all of whom are covered by the conventions. but misses out on benefits flowing from a code such as the position of a preferred supplier on international markets.<sup>267</sup>

Our imaginary worker's comrade in a non-export industry is likely not to have the option of being the subject of a code of conduct. Her employer has no choice but to abide by the national labour law which is based on the more generous ILO convention. (This is not to suggest that, legally, the exporter is not under the same obligation. However in choosing which standards to apply on a day-to-day basis, or at least which abusive work practices to eliminate first, it is submitted that the exporter will follow the code before the law). This two-track approach between export and non-export employers, with a lower level of protection for the former, bears a close similarity to the situation of export processing zones (EPZs). EPZs have posed one of the largest challenges to the ILO system of labour

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<sup>266</sup> GB.273/WP/SDL/1(Rev.1), para. 130.

<sup>267</sup> See *Responding to global standards: A framework for assessing social and environmental performance of industries: Case study of the textile industry in India, Indonesia, and Zimbabwe* (UNIDO, 1998), referred to in GB.273/WP/SDL/1(Rev.1), footnote 152.

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standards over the past 30 years, spurring a large critical literature.<sup>268</sup> Further, the above scenario would dissuade the government in question from ratifying more ILO conventions, as with employers choosing a standard that involves not monitoring or other resource allocation by the government, the benefits for a government of relying on codes of conduct are clear.

Codes thus present the latest competition for the ILO in the standards area. But this competition is different in nature from competitors in the past. Whereas previous competitors have been public sector actors with standards at least as high as fundamental ILO conventions (such as the European Union, the UN Committee on Economic Social and Cultural Rights and even the World Bank), codes come from the private sphere and provide standards which are generally less advantageous for workers than those of the ILO. The challenge arises at a time when not only MNEs but many of the ILO's own constituents are calling for greater flexibility in labour standards: flexibility that codes may appear to promote if not provide. As mentioned during our discussion of the Declaration, proponents of flexibility advocate the maintenance of only a small set of core labour standards, other rights in the workplace then flowing from those core rights. The advent of codes of conduct can only support this vision, as they rarely go beyond basic concepts such as non-discrimination and child labour. Of greater concern is near total exclusion of the right to freedom of association and collective bargaining from codes, the key right from which other employment rights will 'flow' under the flexibility model outlined above.

Codes also lack the purpose and sophistication of ILO standards that may not be appreciated at first glance. Let us take child labour as an example. This is a principle that

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<sup>268</sup> EPZs are industrial zones with special incentives to attract foreign investors in which imported materials undergo some degree of processing before being exported again. These 'special incentives' generally involve the restriction of worker rights, be it in terms of limited rights to organise, lower wages than their colleague outside the zone, and lower job security. For an overview of the concerns raised by EPZs see: ILO, *Economic and social effects of multinational enterprises in export processing zones* (Geneva: ILO, 1988); *Export processing zones in Asia: some dimensions* (ed. N. Vittal) (Tokyo: Asian Productivity Organization, 1977);

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appears frequently in codes of conduct.<sup>269</sup> ILO action in the area of child labour derives from a view on part of the Organisation's constituents that the practice is morally repugnant. While there are concerns about what might be the economic effect on child workers of a proscription on child labour, the motivation behind any proscription is ultimately the child's welfare. Codes of conduct, on the other hand, require suppliers to avoid employing children because there are consumers or shareholders who find the practice morally repugnant. The proscription survives as long as there is either an identifiable consumer or at least consumer or shareholder pressure to maintain it. It may be said that this unnuanced argument takes no account of the chief executives and business owners who may themselves be horrified by child labour. But if we focus on the motivation of the enterprise in adopting a code of conduct, it is submitted that as soon as there is no consumer pressure there is little commercial reason to adopt or maintain a code.

The ILO's normative work in the area of child labour is similarly more sophisticated. One may say that a provision in a code of conduct such as:

The company will not tolerate the use of child labour.

is as good as or even better than the provisions of ILO conventions 138 and 182 dealing with child labour. Yet the code of conduct provision looks a fairly blunt instrument when one compares it to the essentially programmatic nature of the ILO approach to child labour. The code provision cannot compare against the ILO provisions which are part of a broader programmatic approach, involving technical assistance, training, education and rehabilitation.<sup>270</sup> This depth of approach is lost if suppliers choose to respect codes of conduct rather than ILO norms.

A further undermining affect of codes on the ILO system relates to tripartism. Rhetoric aside, tripartism is a strength of the ILO system. The voice of employers and workers in

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World Bank, *Export processing zones* (Washington, D.C.: The World Bank, 1992).

<sup>269</sup> See t.a.n. 234.

<sup>270</sup> GB.273/WP/SDL/1(Rev.1), para. 128.



the standard setting process ensures that the standards set are achievable without being undemanding, and that the process prioritises areas of need rather than solely the political objectives of governments. It has already been mentioned that almost without exception, codes do not even include the input of the workers they claim to 'protect'. They similarly have little public sector input. While this by itself constitutes a serious weakness in the authority and effectiveness of codes of conduct, when we consider the attractiveness of codes regimes over ILO conventions set out above, it becomes a challenge to tripartism, a central feature of the ILO system. Just as it is attractive to exporters and governments (for cost of other reasons) to opt for regulation by a code of conduct as outlined above, so too might the employers in the ILO process become less enthusiastic about supporting the adoption of new conventions and maintaining the integrity of those already adopted, knowing that a more flexible system (with clear commercial benefits such as brand-name enhancement as a bonus) exists. The Employers Group, which has been for some time demanding increased flexibility in industrial relations and a reigning in of the standards system, might see in codes an answer to its demands. It is interesting to note that the Employers Group has strongly rejected any substantive ILO engagement of private initiatives. It might be said that any such course of action taken by the Employers Group would merely be part of the dynamics of rather than an attack on tripartism. However, the co-operation between the constituents on which tripartism is based, is underpinned by the support of all constituents of the ILO project.<sup>271</sup> If one constituent starts to look elsewhere and to other means to achieve the goals of the Organisation (to the exclusion of the ILO), then tripartism is threatened.

These challenges of codes of conduct private initiatives to the ILO standard setting system will only grow as long as the Organisation fails to engage with the phenomenon in substantive way. Clear policy options have been placed before the Governing Body in this

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<sup>271</sup> This can be construed from the Declaration of Philadelphia:

[T]he war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare. (Article I.d.)



regard. These options take into account the limits of tripartite consensus and of the Organisation's mandate. Yet a lack of consensus within the Governing Body, largely driven by a lack of political will on the part of government members, has left the Organisation looking increasingly sidelined.





## V. CONCLUSIONS

The ILO is an international organisation approaching a crossroads. Its principle activity, standard setting, has, as we have seen, gradually been perceived as being more and more irrelevant over the past 30 years under the pressure of changing social and political conditions. Trade liberalisation has undermined not only the capacity of the ILO's system to affect people's working lives, but also the premise that the Organisation's prime role is to set and supervise international labour standards. Faced with looming irrelevance, the ILO must either reinvent its standards system to make it relevant, efficacious and politically acceptable in the contemporary world, or look for other ways and means to ensure that all people are able to 'pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.<sup>272</sup>

In looking at these other ways and means, the ILO is currently presented with two diverse options; options that we have considered in this thesis. The first, the Declaration, appears to represent a new direction from within the Organisation. This new direction, which does not happily coexist with the standards system, promotes a high degree of flexibility in the ILO's future normative work. It focuses on a small set of core or fundamental standards which are said to be immutable, and endeavours to secure their respect by promotion and technical assistance rather than enforcement. The enthusiasm with which the Declaration was adopted and the near-universal calls for reform of the standards system at the 1999 ILC (among other things), suggest that the Declaration will grow in stature at the expense of the standards system. Similarly, the second option, codes of conduct, reduces labour rights to a core set from which all rights of the employment relationship are to flow. The private nature and commercial motives of codes of conduct pose even more problems for the standards system than the Declaration, but they are a reality that the Organisation cannot ignore. If embraced by the ILO, codes of conduct would form a parallel standards system to the traditional ILO system. For the

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<sup>272</sup> Article II(a), Declaration of Philadelphia.

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reasons set out in Part IV however, it appears that codes would attract a greater following among employers and governments than the traditional standards system.

That the ILO's system of international labour standards is thus seriously threatened by these two new initiatives. While it is not being suggested that the standards system will inexorably be subsumed, it does raise some crucial considerations for the Organisation. First, the option of revising the standards system is still open. Although calls for reform have been widespread, there has been little movement on the issue in the Governing Body or the Office. Any new revision initiatives now have the benefit of being able to take account of the Declaration and tailor the reform to bring the Declaration within the standards system to the extent possible.<sup>273</sup> Second, whether or not a revision is achieved, it would be a great loss to the Organisation were the significant benefits of the standards system (outlined in Part II) lost. The development of both the Declaration and the ILO approach to codes of conduct could be infused with some of the virtues of the standards system. Ideas in this regards for the Declaration appear in Part III.4. In respect of codes of conduct, detailed proposals are already before the Governing Body.<sup>274</sup> Finally, before embarking on these two initiatives that have the potential to radically alter the ILO's standard setting role more than at any other time in its 80 year history, the Organisation and its constituents would do well to carefully consider its mandate, both in terms of its goals and in terms of the limits of its purview. The ILO system of labour standards is rooted in the Organisation's goal of securing 'humane conditions of labour' across the globe.<sup>275</sup> The system has survived longer than any other international supervisory system and has survived changing financial and social orthodoxies. As both the Declaration and private sector initiatives are driven by contemporary views and pressures, the ILO should be vigilant against embracing policy directions based purely on today's pressures and interest groups that may ultimately be short-lived.

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<sup>273</sup> Options for this course of action appear in Part III.4 above.

<sup>274</sup> GB.273/WP/SDL/1(Rev.1), paras 114-139.

<sup>275</sup> Preamble, ILO Constitution.



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